TRANSCRIPT

OF

RECORD

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted] 286

NEW YORK TRUST COMPANY AND ALBERT W. PROSS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF J. HARSEN PURDY, DECEASED, PLAINTIFFS IN ERROR,

vs.

MARK EISNER.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MARCH [illegible], [illegible].

(27,564)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 809.

NEW YORK TRUST COMPANY AND ALBERT W. PROSS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF J. HARSEN PURDY, DECEASED, PLAINTIFFS IN ERROR.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 5, 1920.

1 *Writ of Error.*

United States of America, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between New York Trust Company and Albert W. Pross, as Executors of the Last Will and Testament of J. Harsen Purdy, Deceased, plaintiffs, and Mark Eisner, Defendant, a manifest error hath happened, to the great damage of the said plaintiffs, New York Trust Company and Albert W. Pross, as Executors of the Last Will and Testament of J. Harsen Purdy, deceased, as is said and appears by its complaint: We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under you seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capitol in the City of Washington, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the 3rd day of April, 1920, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 5th day of March,
2 in the year of our Lord one thousand nine hundred and twenty and of the Independence of the United States the one hundred and forty-fourth.

[seal of the court.] ALEX. GILCHRIST, Jr.,
Clerk of the District Court of the United States of America for the Southern District of New York.

The foregoing writ is hereby allowed.

LEARNED HAND,
United States District Judge.

3 United States District Court for the Southern District o
New York.

THE NEW YORK TRUST COMPANY and ALBERT W. PROSS, as Exe-
cutors of the Last Will and Testament of J. Harsen Purdy, De-
ceased,

against

MARK EISNER.

To the above-named Defendant:

You are hereby summoned to answer the complaint in thi action, and to serve a copy of your answer on the plaintiff's attorne within twenty days after the service of this summons, exclusive of th day of service; and in case of your failure to appear, or answer judgment will be taken against you by default for the relief de manded in the complaint.

Witness, the Hon. Learned Hand, Judge of the District Cour of the United States for the Southern District of New York, at th City of New York, this 23 day of May in the year one thousan nine hundred and nineteen.

(Signed) ALEX GILCHRIST, JR.,
[SEAL.] *Clerk.*

Francis J. McLoughlin, Plaintiff's Attorney. Office and Post office Address, 34 Nassau Street, Borough of Manhattan, New Yor City.

4 In the District Court of the United States for the Southern
District of New York.

THE NEW YORK TRUST COMPANY and ALBERT W. PROSS, as Exe-
cutors of the Last Will and Testament of J. Harsen Purdy, De-
ceased, Plaintiffs,

vs.

MARK EISNER, Defendant.

The plaintiffs above named complain of the defendant and respect fully show, as follows:

I.

The plaintiff, The New York Trust Company, is a corporatio duly organized and existing under the laws of the State of Ne York, having its principal office in the Borough of Manhattan i the City and State of New York.

II.

The plaintiffs are the duly appointed, qualified and acting executors of the last will and testament and codicil of J. Harsen Purdy, deceased.

III.

At all times in this complaint mentioned and until a date in the early part of the year 1919, the defendant was Collector of Internal Revenue of the United States for the Third District
5 of New York, having his office and official place of residence in the Borough of Manhattan, in the City, County and State of New York.

IV.

On December 18, 1916, said J. Harsen Purdy died, being then a resident of said Borough of Manhattan, in the City, County and State of New York, leaving a valid last will and testament and codicil which was thereafter, on or about January 13, 1917, duly admitted to probate by the Surrogate's Court of said New York County, a court of competent jurisdiction. Said will, in addition to certain provisions which are immaterial to this action, contains the following effective provision, being all the Eleventh clause thereof:

"Eleventh. I direct that all succession, inheritance, and transfer taxes upon the property devised and bequeathed by the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth clauses of my will shall be paid out of the residuary estate devised and bequeathed by the Twelfth clause of my will."

Said codicil, in addition to certain provisions which are immaterial to this action, contains the following effective provision, being all the Sixth clause thereof:

"Sixth. I direct that all succession, inheritance, and transfer taxes upon the property bequeathed by the codicil, shall be paid out of the residuary estate devised and bequeathed by the Twelfth clause of my said will."

V.

The said J. Harsen Purdy, deceased, was survived by Frances O. Purdy, Catherine H. Farley and Eleanor Purdy Blodget, being all the children living at the time of said decedent's death of William H. Purdy, brother of said decedent, named in the Twelfth
6 clause of his said last will, and no child of said William H. Purdy died before said decedent leaving descendants. The residuary estate of said decedent was disposed of by the following effective clause of his said last will:

"Twelfth. All the rest, residue, and remainder of my estate, whether real, personal, or mixed, and wherever the same may be situated, including that over which I have power of appointment either by will or by deed, I give, devise, and bequeath to my said trustees to have and to hold the same to them and to their survivor and successors, for the uses and purposes next hereinafter set forth:

"(*a*) To divide my said residuary estate into as many shares as there may be children of my brother, William H. Purdy, living at the time of my death, and as there may have been children of his who may have died before me, leaving descendants who survive me.

"(*b*) To divide and pay over the principal of one of said shares in equal portions among and to the decendants of each child of my said brother who shall have died before me leaving descendants who survive me, such descendants to take per stirpes and not per capita.

"(*c*) To collect the income of the remaining shares, and to pay over to each one of the said children of my said brother who may survive me the income of one of said shares during his life.

"(*d*) Upon the death of each one of the said children, to divide and pay over the principal of the share of which the income has been paid to him during his lifetime among and to his descendants living at the time of his death, such descendants to take per stirpes and not per capita.

7 The value of the residuary estate passing under the foregoing clause of said will of said decedent was $127,414.96, which sum is still subject, however, to some diminution by reason of administration expenses the amount of which has not yet been determined.

VI.

Plaintiffs, as executors, as aforesaid, were lawfully required to pay out of the estate of said decedent and did pay out of said estate inheritance and succession taxes as follows, that is to say:

Paid to—	Date of payment.	Amount.
State of New York	1917, June 15	$30,000.00
" "	1918, January 30	2,988.97
State of Colorado	1917, November 5	80.00
State of Wisconsin	1917, November 9	602.16
State of Kansas	1917, November 9	1,409.95
State of Michigan	1917, November 21	292.14
State of New Jersey	1917, November 15	2,396.88
Total		$37,769.88

On May 6, 1918, the said Surrogate's Court for the said New York County, by an order duly entered, allowed and credited plaintiffs, as executors as aforesaid, in their account as such executors, the whole

amount of said $37,769.88, being the total of the amounts paid as aforesaid as inheritance and succession taxes, the said amounts being included in said account in a schedule known and designated as Schedule C, Part I, which said schedule was entitled as follows, to wit:

"A statement of all moneys paid by us for funeral and other necessary expenses of administration of the estate, chargeable against principal."

8 Said account, including said Schedule C, Part I, was duly sanctioned, approved and allowed by said order of said Surrogate's Court.

VII.

The value of the gross estate of said decedent, at the time of his death, as defined in Section 202 of the Act of Congress of September 8, 1916 (39 Stat. 777) was $769,799.39 and the amount of all funeral expenses, debts and expenses of administration (except taxes on inheritances and successions as aforesaid) was $61,322.08, and the amount of the aforesaid inheritance and succession taxes was $37,769.88, leaving a net value for the payment of legacies, except as reduced by taxes payable to the United States, of $670,707.43.

VIII.

Prior to and on December 14, 1917, the defendant claiming to act as Collector of Internal Revenue of the United States for the Third District of New York, as aforesaid, represented to plaintiffs that there was lawfully due to the United States, and to him as such Collector, the sum of $23,910.77, claiming and representing that said sum had been lawfully assessed against said estate, under and in accordance with Tile II of the aforesaid Act of Congress of September 8, 1916. And on said December 14, 1917, and prior thereto, said defendant demanded that plaintiffs pay said sum to him the said defendant and threatened plaintiffs with distraint and with penalties and forfeitures in case such payment should be refused. Wherefore, on December 14, 1917, but under duress and with protest and to avoid penalties threatened by the defendant, the plaintiffs, as executors as aforesaid, paid to the defendant, invol-
9 untarily and insisting that neither they nor the said estate was lawfully required to make said payment or any part thereof, said sum of $23,910.77 out of the residuary estate of said decedent.

IX.

In making his said demand, as aforesaid, for said sum of $23,910.77, the defendant pretended to be authorized by said Title II of said Act of Congress of September 8, 1916, and by a pretended regulation purporting to be issued in accordance with said Title II,

and known as Treasury Decision No. 2524, which regulation, in words and figures, is as follows:

"Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C., September 10, 1917.

"To Collectors of Internal Revenue:

An exhaustive study of the nature of State inheritance taxes has led this office to the conclusion that amounts paid to States on account of inheritance, succession, or legacy taxes are not 'such other charges against the estate, as are allowed by the laws of the jurisdiction,' and accordingly are not deductible in arriving at the amount of Federal estate tax. T. D. 2395 is hereby revoked.

DAVID A. GATES,
Acting Commissioner.

Approved:
BYRON R. NEWTON,
Acting Secretary."

Said defendant refused to deduct the said $37,769.88, being the amount paid as aforesaid, as inheritance and succession taxes and allowed to the plaintiffs as a charge against the principal of the estate of said decedent, as aforesaid, before determining the amount or value of the net estate upon which he claimed that the pretended tax had been or should be computed, by such refusal to deduct, increasing the amount which he demanded and collected, as aforesaid, by five per centum of said $37,769.88 or in the sum of $1,888.49. The whole of said $1,888.49 was added to the amount demanded and collected, as aforesaid, on the theory that said inheritance and succession taxes, paid as aforesaid, were not charges against the estate of said decedent allowed by the jurisdiction in which said estate was lawfully administered.

X.

On or about March 13, 1919, plaintiffs, as executors as aforesaid, duly appealed to the Commissioner of Internal Revenue from and on account of the action of the defendant, in holding them or the estate of said decedent liable for the payment of said sum of $23,910.77, and each and every part thereof, and in collecting said sum in the manner aforesaid, and represented to said Commissioner that the collection of said sum was unlawful and claimed and demanded that the whole of said sum should be refunded. On or about April 18, 1919, said Commissioner did reject and disallow the said appeal to him made by the plaintiffs and refused and now refuses to refund said sum of $23,910.77, and every part thereof. No part of said $23,910.77 has been repaid or refunded to plaintiffs or to said estate

by the defendant or otherwise. And the defendant has refused and continues to refuse to repay said $23,910.77 or any part thereof.

XI.

Plaintiffs further represent and allege that the said action of the defendant, in demanding said sum of $23,910.77 and enforcing and exacting payment thereof, was without any warrant or authority of law and that the whole of said sum was illegally demanded and collected for the reason that said Title II of said Act of September 8, 1916, is contrary to the Constitution of the United States and unconstitutional and void in that:

11 *a*. It attempts to levy a tax upon the operation of the laws of the several States and to diminish and impair the exercise by the several States of their exclusive constitutional right to control and regulate the administration of the estates of decedents.

b. It attempts to create a tax which, if valid, would tax the right or privilege of one individual at a rate fixed with reference to the value of the right or rights or privilege or privileges of another individual or of other individuals, thus bringing about a profound inequality which transcends the limitations arising from the fundamental conceptions of free government which underlie all Constitutional systems.

c. It is not a valid exercise of any power to lay taxes, imposts or excises conferred upon the Congress of the United States, because it does not lay equal burdens upon or in respect of persons or property similarly situated but makes arbitrary, accidental and unreasonable discriminations and classifications and, as to these plaintiffs, would, if valid, exact and has exacted more from them than from others taking legacies and distributive shares of like character and equal value under substantially identical circumstances and conditions.

d. It attempts to create a direct tax which, if valid, would be a direct tax not apportioned among the several States, in proportion to population.

e. It attempts to create a tax which, if valid, would not be uniform throughout the United States.

12 *f*. It would, if effective, take property without due process of law.

XII.

Plaintiffs further represent and allege that the said action of the defendant in demanding so much of said sum of $23,910.77 as was demanded and paid, as aforesaid, by reason of the refusal to consider said $37,769.88, being the sum of the inheritance and succession taxes paid as aforesaid, to be a charge against said estate within the meaning of section 203 of said Act of September 8, 1916, and therefore deductible before determining the net estate on which said

pretended tax was intended to be computed, was without any warrant or authority of law and that such portion of said pretended tax was illegally demanded and collected for all the reasons aforesaid and also in this:

a. The said pretended regulation known as Treasury Decision No. 2,524, hereinbefore in paragraph VII hereof fully set forth, was not and is not a lawful rule or regulation but was and is illegal and void and the only lawful rule or regulation consistent with said Title II of said Act of Congress of September 8, 1916, and amendments, if said Title and said amendments are Constitutional, is the rule contained in Treasury Decision No. 2,395, which said Treasury Decision in words and figures, is as follows:

13 "Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C., November 17, 1916.

"SIR:

"Replying to your letter of the 14th instant inquiring whether state inheritance taxes are deductible from the gross estate of a decedent, in determining the Federal tax due under Title II of the Revenue Act of September 8, 1916, you are informed that among the deductions from the gross estate specified in Section 203, Paragraph *a*, Subparagraph 1, of the above-mentioned Act, is the item 'such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.'

"Since it does not appear open to question that state inheritance taxes are a primary charge against an estate and allowable as credits to executors and administrators in every state imposing such taxes, they are clearly deductible from the gross estate of the decedent whose property and interests are liable to the Federal Tax imposed in Title II of the Act of September 8, 1916.

"Respectfully,

"W. H. OSBORN,
"Commissioner of Internal Revenue.

"Collector, 23rd District, Pittsburgh, Pa.

"Approved:
"B. R. NEWTON,
"Acting Secretary of the Treasury."

b. The sum of said inheritance and succession taxes paid, as aforesaid, was a charge against the estate allowed by the laws of the jurisdiction in which it was lawfully administered in accordance with the true intent and meaning of said Section 203 of said Title II of said Act of September 8, 1916.

Wherefore, these premises considered, the plaintiffs demand judgement against the defendant in the sum of $23,910.77, with interest from December 14, 1917.

(Signed) FRANCIS J. McLOUGHLIN,
Attorney for Plaintiff.

(Signed) H. T. NEWCOMB,
Of Counsel.

14 CITY, STATE AND COUNTY OF NEW YORK, *ss:*

Albert W. Pross, being duly sworn says:

I am one of the plaintiffs named in the foregoing complaint and acquainted with the facts therein set forth. Said complaint is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

(Signed) ALBERT W. PROSS.

Sworn to before me this 23rd day of May, 1919.

[SEAL.] FLORENCE LOEWENTHAL,
Notary Public.

Bronx County No. 55.
New York County No. 292.
Term Expires March 30, 1920.

15 United States District Court, Southern District of New York.

THE NEW YORK TRUST COMPANY and ALBERT W. PROSS, as Executors of the Last Will and Testament of J. HARSEN PURDY, Deceased, Plaintiffs,

vs.

MARK EISNER, Defendant.

Demurrer.

The defendant herein by his attorney, Francis G. Caffey, United States Attorney for the Southern District of New York, appearing herein, demurs to the complaint herein, on the ground that it does not state facts sufficient to constitute a cause of action.

Wherefore defendant demands judgment against the plaintiffs, that the complaint herein be dismissed with costs.

FRANCIS G. CAFFEY,
United States Attorney, Attorney for Defendant.

Office and Post Office Address U. S. Courts & Post Office Building, Broadway & Park Row, Borough of Manhattan, New York City.

16 At a Stated Term of the United States District Court Held in and for the Southern District of New York, in the United States Court House and Post Office Building in the Borough of Manhattan, City, County and State of New York, on the 9th day of February, 1920.

Present: Hon. Julian W. Mack, Circuit Judge.

THE NEW YORK TRUST COMPANY and ALBERT W. PROSS, as Executors of the Last Will and Testament of J. HARSEN PURDY, Deceased, Plaintiffs,

vs.

MARK EISNER, Defendant.

Order.

The issues of law raised by the demurrer of the defendant to the complaint of the plaintiffs herein having come on to be heard by this Court.

Now, after hearing Julian Hartridge, Esq., Assistant United States Attorney for the Southern District of New York, of counsel for the defendant, in support of said demurrer, and H. T. Newcomb, Esq., of counsel for the plaintiffs, in opposition thereto, and due deliberation having been had thereon, and on motion of Francis G. Caffey, United States Attorney for the Southern District of New York, attorney for the defendant, it is

Ordered that the demurrer of the defendant to the complaint of the plaintiffs herein be and it hereby is sustained, and it is

Further ordered that the complaint herein be dismissed upon the merits and that the defendant have final judgment against the plaintiffs dismissing said complaint upon the merits and for his costs to be taxed.

(Signed) JULIAN W. MACK,
U. S. C. J.

17 United States District Court, Southern District of New York.

THE NEW YORK TRUST COMPANY and ALBERT W. PROSS, as Executors of the Last Will and Testament of J. HARSEN PURDY, Deceased, Plaintiffs,

vs.

MARK EISNER, Defendant.

Judgment.

The issues of law raised by the demurrer of the defendant to the complaint of the plaintiffs herein having duly come on to be heard before the Honorable Julian W. Mack, United States Circuit Judge, at a Stated Term of this court, and after hearing Julian Hartridge, Esq., Assistant United States Attorney, of counsel for the defendant,

in support of said demurrer, and H. T. Newcomb, Esq., of counsel for plaintiffs, in opposition thereto, and due deliberation having been had thereon, and the Court having handed down its opinion on the 19th day of January, 1920, sustaining said demurrer and an order having been duly made and entered on the 9th day of February, 1920, sustaining said demurrer to the complaint of the plaintiffs herein and ordering that the complaint be dismissed upon the merits and that the defendant have final judgment against the plaintiffs, dismissing said complaint upon the merits and for his costs to be taxed and the costs of the said defendant having been taxed in the sum of Eighteen and 20/100 Dollars ($18.20).

Now on motion of Francis G. Caffey, United States Attorney for the Southern District of New York, attorney for defendant, it is

Adjudged that the complaint herein be and it hereby is
18 dismissed on the merits and that the defendant recover of the plaintiffs the sum of Eighteen and 20/100 Dollars ($18.20) his costs as taxed, and that said defendant have execution therefor.

Judgment signed this 13th day of February, 1920.

(Signed) ALEX GILCHRIST, Jr.,
Clerk.

19 United States District Court for the Southern District of New York.

New York Trust Company and Albert W. Pross, as Executors of the Last Will and Testament of J. Harsen Purdy, Deceased, Plaintiffs,

vs.

Mark Eisner, Defendant.

Opinion.

Mack, *Judge Julian W.*:

Demurrer to a complaint for recovery of taxes paid by an executor raises questions as to the constitutionality and interpretation of Title II Act of Sept. 8, 1916 (39 Stat. 777), Federal Inheritance Tax Act, as it stood before the amendments of March 3, and Oct. 3, 1917.

1. Constitutionality:

Clearly the tax is not one on the property of the decedent but, as it purports to be, on the privilege of transfer by death. Equally clearly it is not on the individual legacies or on the right of the individual legatees to receive them, measured by the entire net estate, but on the right of decedent to have the estate pass by will or intestacy. Plunkett v. Trust Co. 124 N. E. R. (Mass.) 265 and cases cited. While, as pointed out by White, C. J. (then Justice) in Knowlton v. Moore, 178 U. S. 41, 77, there is a clear "distinction between a tax on the interest to which some person succeeds on a

death and a tax on the interest which ceased by reason of the
20 death," there is no distinction whatsoever in the power of Congress under art. I, sec. 8 of the Constitution—"to collect taxes, duties, imposts and excises"—to provide for either kind of tax. The doubt as to validity expressed in that case, was limited to measuring a tax upon the succession of each individual legatee to a specific legacy by the value, not of his legacy, but of the entire net estate of the decedent; it did not extend to the power of Congress expressly to impose an estate tax rather than a legacy tax—to measure it by the value of the net estate and to cast the burden upon the residuary personal estate.

Concededly, under Knowlton v. Moore, Congress may levy inheritance taxes on the privilege of succession to property transferred by death of the owner. It is contended, however, that a tax, not on the right of the beneficiary to receive, but on the privilege of transfer by will or intestacy, is unconstitutional, as upon an operation of the means provided by the State for the performance of functions exclusively within State control; that in some way, because ordinarily the rights which cease at death do not pass immediately but only subject to the probate processes prescribed by the State, such a tax becomes a tax on the instrumentalities of a State. As both the right to receive a succession at or by death and the right to transfer at death are subject to exclusive State control, there is no basis, in my judgment, for any such distinction between them in respect to the constitutional power of Congress.

Again, it is urged that until there occurs some exercise of some right as to which a private option of renunciation exists, there is nothing to which the Federal taxing power can constitutionally be applied. There is, however, ordinarily no right of renuncia-
21 tion under intestacy laws. Moreover, the option itself is derived from the State in the exercise of its exclusive control.

2. Interpretation:

Sec. 203 defines as the taxable net estate, the gross estate less,

"(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

"(2) An exemption of $50,000.00."

The question presented is whether this clause permits of the deduction of State Inheritance taxes paid by the executor in a number of States and allowed to him in his accounting in the Surrogate's Court of decedent's domocile.

On Nov. 17, 1916, the Treasury Department ruled (T. D., 2395)

that as "state inheritance taxes are a primary charge against an estate and allowable as credits to executors and administrators, * * * they are clearly deductible."

Subsequently on Sept. 10, 1917, this ruling was revoked and on an exhaustive study of the nature of State inheritance taxes, they were declared not deductible.

While doubts in a taxing statute are to be resolved in favor of the taxpayer, the mere fact that the Treasury Department changed its original interpretation is not conclusive that the language of the act is so doubtful as to compel the application of this canon of
22 construction.

If this were a tax on the right of succession, an intention to tax only that which eventually passes to a beneficiary would be presumed. But, as a tax on the cessation of decedent's interest, such a persumption would extend at best to the entire net estate without deduction of any charges levied, not on it, but on the right or on the share of individual beneficiaries. What then are the "charges against the estate as are allowed by the laws of the jurisdiction" included in clause G? Not all charges which under the laws an executor or administrator may or even must pay, whether for his own protection or otherwise, but only such charges, like all the other deductions, which affect the estate as a whole, only charges against the estate.

Estate taxes or probate duties levied by the State would fall within this clause; Northern Trust Co. v. Lederer 257 Fed. 812; but taxes levied on the shares to be received by beneficiaries, reducing not the estate but the individual's share cannot be deemed a charge upon the estate merely because the duty with the corresponding liability and right to account in respect thereto in his estate accounts, is imposed upon the executor or administrator to pay the tax before distributing the share itself. The nature of the tax as a succession not an estate tax, remains unchanged, despite the additional obligation thus imposed.

The changes made by the present law (Act of Feb. 24, 1919, sec. 403) afford no basis for interpreting the former law, for while it excludes State succession and legacy taxes, it also expressly excludes State estate or inheritance taxes.

In my judgment the later interpretation of the act by the Treasury Department is sound and the demurrer must be sustained.

23 United States District Court for the Southern District of New York.

NEW YORK TRUST COMPANY and ALBERT W. PROSS, as Executors of the Last Will and Testament of J. Harsen Purdy, Deceased, Plaintiffs,

vs.

MARK EISNER, Defendant.

Petition for Writ of Error.

To the Judges of the District Court:

And now come the New York Trust Company and Albert W. Pross, as Executors of the Last Will and Testament of J. Harsen Jurdy, Deceased, the plaintiffs herein, and say that on or about the 13th day of February, 1920, this Court entered judgment herein in favor of the defendant and against the plaintiffs sustaining the demurrer and dismissing the complaint hereon on the merits with $18.20 costs, in which judgment and the proceedings had prior thereto in this action certain errors were committed to the prejudice of the plaintiff, all of which will appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue out of the Supreme Court for the correction of the said errors.

FRANCIS J. McLOUGHLIN,
Attorney for Plaintiff, 32 Nassau Street, Borough of Manhattan, New York City.

H. T. NEWCOMB,
Of Counsel.

24 United States District Court, Southern District of New York.

NEW YORK TRUST COMPANY and ALBERT W. PROSS, as Executors of the Last Will and Testament of J. Harsen Purdy, Deceased, Plaintiffs,

vs.

MARK EISNER, Defendant.

Assignment of Errors.

And now come New York Trust Company and Albert W. Pross, as executors of the last will and testament of J. Harsen Purdy, deceased, by Francis J. McLoughlin, their attorney, and in connection with, and as part of, their petition for a writ of error, filed herein, make the following assignment of errors, which they aver were committed by the Court in the rendition of the judgment against the plaintiffs appearing upon the record herein to wit:

1. The Court erred in holding and deciding that the complaint did not state facts sufficient to constitute a cause of action against the defendant.

2. The Court erred in sustaining the demurrer of defendant to the complaint and in refusing to overrule said demurrer.

3. The Court erred in dismissing the complaint and in
25 rendering final judgment for the defendant and in refusing to render judgment for the plaintiffs.

4. The Court erred in holding and deciding that Title II of the Act of Congress of September 8, 1916, does not attempt to create a direct tax without apportioning the same among the several states according to population as required by Article I, Sections 2 and 9 of the Constitution of the United States.

5. The Court erred in holding and deciding that said Title of said Act (if it is not an unconstitutional attempt to create a direct tax) does not attempt to create a tax in respect of interests received by reason of death and in respect of such interests, to impose different, unequal and widely varying burdens upon persons or property identically, equally and similarly situated, and, in refusing to hold that said Title of said Act is not within the scope of the power to tax or the legislative power conferred upon Congress by the Constitution; and contrary to fundamental principles of free government, expressed and implied by the Constitution of the United States, and a taxing of property without due process of law in viola-
26 tion of the Fifth Amendment to the Constitution of the United States.

6. The court erred in holding and deciding that said Title of said Act is a valid attempt to impose a tax in respect of interests in property which cease at the death of the owner thereof and in refusing to hold that (if said Title of said Act is not an unconstitutional attempt to create a direct tax or an unconstitutional attempt to create a tax in respect of rights to receive interests in decedents' estates) it is an unconstitutional attempt to create a tax in respect of transfers required by the States as a part of the process of administering decedents' estates and in the exercise of their exclusive power to regulate and control such adminsitration.

7. The Court erred in refusing to hold that said Title of said Act is unconstitutional and void.

8. The court erred in holding and deciding that the "net estate," defined by Section 203 of said Title of said Act, on which the exaction complained of was computed, could lawfully include any values in excess of the aggregate of the values actually passing to legatees and distributees of said estate.

27 9. The Court erred in holding and deciding that all payments allowed to plaintiffs in their accounts as executors, in their account entitled "a statement of all moneys paid by us for fu-

neral and other necessary expenses of administration of the estate, chargeable against principal," were not deductions required and proper to be made before determining the value of said "net estate," within the meaning of said Section 203 of said Title of said Act.

10. The Court erred in holding and deciding that the inheritance and succession taxes paid to the States of New York, Wisconsin, Kansas, Michigan, Colorado and New Jersey, were not "other charges against the estate allowed by the laws of the jurisdiction * * * under which the estate" was "administered," within the meaning of Section 203 of said Title of said Act, and in refusing to hold that said inheritance and succession taxes were not deductions required and proper to be made before determining the value of said "net estate."

11. The Court erred in holding and deciding that Congress has Constitutional power to impose a tax in respect of amounts exacted by the States, in the exercise of their exclusive power to regulate and control the administration of decedents' estates,and in refusing
28 to hold (if said Section 203 of said Title of said Act must be interpreted or construed so as to require the inclusion of such exactions in said "net estate") that any Federal tax in respect of such State exactions is unconstitutional and void.

Wherefore the plaintiffs pray that the judgment of the said District Court may be reversed and a new trial ordered, or that judgment may be directed in favor of the plaintiffs.

FRANCIS J. McLOUGHLIN,
Attorney for Plaintiffs.

32 Nassau Street, Borough of Manhattan, New York City.

H. T. NEWCOMB,
Of Counsel.

29 District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The New York Trust Company and Albert W. Pross, as Executors of the Last Will and Testament of J. Harsen Purdy, Deceased, Plaintiffs-Appellants,

against

Mark Eisner, Defendant-Respondent.

Bond on Appeal.

Know all men by these presents, That The New York Trust Company and Albert W. Pross, as Executors of the Last Will and Testament of J. Harsen Purdy, Deceased, as Principal and National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, as surety, are held and firmly bound unto the above named Mark Eisner, in the sum of Two Hundred and Fifty

($250.00) Dollars to be paid to the said Mark Eisner, for the payment of which well and truly to be made, said principal and surety bind themselves, their heirs, executors, administrators and assigns jointly and severally firmly by these presents. Sealed and dated the 26th day of February, 1920.

Whereas, the above named The New York Trust Company and Albert W. Pross, as Executors of the Last Will and Testament of J. Harsen Purdy, Deceased, have prosecuted a writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled suit, by a judge of the District Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named The New York Trust Company and Albert W. Pross, as Executors of the Last Will and Testament of J. Harsen Purdy, Deceased, shall prosecute said writ to effect, and answer all damages and costs if they fail to make said writ good, then this obligations shall be void, otherwise the same shall be and remain in full force and virtue.

ALBERT W. PROSS, *Executor.* [L. S.]
THE NEW YORK TRUST COMPANY. [CORPORATE SEAL.]

Attest:
B. G. CURTS,
Secretary.

NATIONAL SURETY COMPANY,
[SEAL.] F. J. HORNE, *Vice-President.*
By WM. A. THOMPSON,
Vice-President.

Attest:
E. M. McCARTHY,
Resident Assistant Secretary.

STATE OF NEW YORK,
County of New York, ss:

On this 27th day of February, 1920, before me personally came the within named Albert W. Pross, to me known and known to me to be the individual described in and who executed the within bond, and he acknowledged that he executed the same.

ANNA G. TIENKEN,
Notary Public, Kings County.

Kings County Clerk's No. 175.
Kings County Register's No. 1090.
Certificate filed in New York County.
Clerk's No. 209, Register's No. 1266.
Commission expires March 30th, 1921.

31 *Affidavit, Acknowledgement and Justification by Guaranty or Surety Company.*

State of New York,
County of New York, ss:

On this 26th day of February, 1920, before me personally came Wm. A. Thompson, known to me to be the Vice-President of National Surety Company, the corporation described in and which executed the foregoing Bond of The New York Trust Company, and Albert W. Pross, as Executors of the Last Will and Testament of J. Harsen Purdy, Deceased, as surety, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, that the seal affixed to the within Bond of The New York Trust Company and Albert W. Pross as Executors of the Last Will and Testament of J. Harsen Purdy, deceased, is the corporate seal of said National Surety Company, and was thereto affixed by authority of the Board of Directors of said Company, and that he signed his name thereto by like authority as Vice-President of said Company, and that he is acquainted with E. M. McCarthy and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said E. M. McCarthy subscribed to said Bond is in the genuine handwriting of said E. M. McCarthy, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unincumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Nine Million Dollars.

WM. A. THOMPSON,
(Deponent's Signature.)

Signed, sworn to and acknowledged before me this 26th day of February, 1920.

H. E. EMMETT,
32 *Notary Public, &c., for Kings County No. 12.*

Certificate filed in N. Y. Co. No. 32.

State of New York,
County of New York, ss:

On this 1 day of March, 1920, before me personally came H. J. Horne, to me known, who, being by me duly sworn, did depose and say that he resides in Babylon, L. I., N. Y., that he is the Vice President of the New York Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the seal

of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name to the said instrument by like order.

[SEAL.]

ARTHUR H. INDELL,
Notary Public, New York County.

County Clerk's No. 18.
Register's No. 10015.

I approve of the within Bond, and of the sufficiency of the surety thereon.

LEARNED HAND,
U. S. D. J.

March 5, 1920.

33 By the Honorable Learned Hand, one of the Judges of the United States District Court for the Southern District of New York.

To Mark Eisner, Greeting:

You are hereby cited and admonished to be and appear before a United States Supreme Court, to be holden at the City of Washington, in the District of Columbia, on the 3rd day of April, 1920, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein New York Trust Company and Albert W. Pross, as Executors of the Last Will and Testament of J. Harsen Purdy, Deceased, are plaintiffs in rror and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City f New York, in the District and Circuit above named, this 5th day f March in the year of our Lord one thousand nine hundred and wenty and of the Independence of the United States the one hundred nd forty-fourth.

LEARNED HAND,
Judge of the District Court of the United States for the Southern District of New York.

Service of the above citation is hereby admitted this 6th day of arch, 1920.

FRANCIS G. CAFFEY,
Attorney for Defendant.

34 *Stipulation.*

United States District Court, Southern District of New York.

New York Trust Company and Albert W. Pross, as Executors of the Last Will and Testament of J. Harsen Purdy, Deceased, Plaintiffs,

vs.

Mark Eisner, Defendant.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated New York, March 18, 1920.

FRANCIS J. McLOUGHLIN,
Attorney for Plaintiff.
FRANCIS G. CAFFEY,
U. S. Att'y.
Attorney for Defendant.

35 *Clerk's Certificate.*

United States of America,
Southern District of New York, ss:

New York Trust Company and Albert W. Pross, as Executors of the Last Will and Testament of J. Harsen Purdy, Deceased, Plaintiffs,

vs.

Mark Eisner, Defendant.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

In testimony whereof, I have causes the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 18th day of March, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States the one hundred and forty-fourth.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, Jr., *Clerk.*

Endorsed on cover: File No. 27,564. S. New York D. C. U. S. Term No. 809. New York Trust Company and Albert W. Pross, as Executors of the Last Will and Testament of J. Harsen Purdy, deceased, plaintiffs in error, vs. Mark Eisner. Filed March 19th, 1920. File No. 27,564.

MAR 16 1921
JAMES D. MAHER
CLERK

Supreme Court of the United States

October Term, 1920

No. 286

NEW YORK TRUST COMPANY and ALBERT W. PROSS, as Executors of the Last Will and Testament of J. HARSEN PURDY, Deceased,

Plaintiffs-in-error,

vs.

MARK EISNER,

Defendant-in-error.

On Writ of Error to the District Court of the United States for the Southern District of New York.

BRIEF FOR PLAINTIFFS-IN-ERROR

Francis J. McLoughlin,
Attorney for Plaintiffs-in-error.

George Sutherland,
H. T. Newcomb,
Of Counsel.

Chas. P. Young Co., Printers, 190 William St., N. Y.

CONTENTS.

Appendix:

AUTHORITIES CITED

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 286

NEW YORK TRUST COMPANY and ALBERT W. PROSS, as Executors of the Last Will and Testament of J. HARSEN PURDY, deceased.

Plaintiffs-in-error,

vs.

MARK EISNER,

Defendant-in-error.

ON WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

I.

STATEMENT.

A. STATUS.

PLAINTIFFS-IN-ERROR sued DEFENDANT-IN-ERROR, sometime UNITED STATES COLLECTOR OF INTERNAL REVENUE, in the DISTRICT COURT OF THE UNITED STATES, for the SOUTHERN DISTRICT OF NEW YORK, to recover $23,910.77 exacted from them under color of the "ESTATE TAX" provisions of the Act of CONGRESS of September 8, 1916 (*39 Stat.*

777). Defendant's demurrer to the declaration was sustained by the DISTRICT COURT and judgment being entered, this writ of error was obtained.

B. THE ISSUES.

The issues raised by this writ of error are:—

1. Is the estate tax attempted to be established by the Act of September 8, 1916, sections 200 to 212, inclusive, constitutional and

2. If the estate tax is constitutional, should amounts paid as State taxes on inheritances and successions be included in the value of the "net estate" on which the Federal tax is computed?

It will be noted that the first is a question of the CONSTITUTIONAL POWER to enact a particular law; the second, a question of INTERPRETATION.

C. FACTS.

The significant facts, alleged in the declaration and admitted by the demurrer, are:—

First.—PLAINTIFFS-IN-ERROR are the duly appointed, qualified and acting executors of the will of J. HARSEN PURDY, a citizen and resident of the UNITED STATES and of the STATE OF NEW YORK, who died, testate, on December 18, 1916 (*R. 3*).

Second.—DEFENDANT-IN-ERROR, at all times mentioned in the complaint, and until early in 1919, was COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE THIRD DISTRICT OF NEW YORK (*R. 3*).

Third.—The residuary estate of the decedent was divided equally among three children of decedent's brother

(*R. 3-4*) and his will directed that all succession, inheritance and transfer taxes required of his estate should be paid out of his residuary estate (*R. 3*).

Fourth.—STATE inheritance and succession taxes amounting to $37,769.88 were paid from June 15, 1917, to January 30, 1918, inclusive. Of this total $32,988.97 was paid in NEW YORK and $4,780.91, in all, in varying amounts, to the STATES of COLORADO, WISCONSIN, KANSAS, MICHIGAN and NEW JERSEY (*R. 4.*)

Fifth.—The whole of the above $37,769.88 was on May 6, 1918, allowed and credited to PLAINTIFFS-IN-ERROR, as executors in their accounts as such, by the SURROGATES' COURT of NEW YORK COUNTY, NEW YORK, a court of competent jurisdiction, in a schedule or account entitled "A statement of all moneys paid by us for funeral and other necessary expenses of administration of the estate, chargeable against principal" (*R. 4-5*).

Sixth.—The value of the estate of decedent at the time of his death, after deduction of funeral expenses, debts and expenses of administration (except inheritance and succession taxes, STATE or FEDERAL) was $708,477.31; the value less STATE taxes on inheritances and successions was $670,707.43 (*R. 5*).

Seventh.—Claiming to act as COLLECTOR OF INTERNAL REVENUE, DEFENDANT-IN-ERROR exacted from PLAINTIFFS-IN-ERROR the sum of $23,910.77, alleging that it was due as a lawfully assessed tax under the "ESTATE TAX" provisions of the Act of September 8, 1916, which they to him paid, involuntarily and under protest, out of their decedent's residuary estate, on December 14, 1917, and this sum has never been repaid (*R. 5-7*).

Eighth.—This sum of \$23,910.77 was computed in respect of an aggregate which included the \$37,769.88 paid, as aforesaid, as STATE taxes on inheritances and successions. If said \$37,769.88 ought not to have been so included the amount exacted was excessive by the sum of \$1,888.49, even if, in other respects, the exaction was lawful *(R. 5-6)*.

Ninth.—On March 13, 1919, PLAINTIFFS-IN-ERROR duly appealed to the COMMISSIONER OF INTERNAL REVENUE for the refund of all said \$23,910.77 and on April 18, 1919, their appeal was denied *(R. 6-7)*.

II.

SPECIFICATIONS OF ERROR.

1. The Court erred in holding and deciding that the complaint did not state facts sufficient to constitute a cause of action against the defendant.

2. The Court erred in sustaining the demurrer of defendant to the complaint and in refusing to overrule said demurrer.

3. The Court erred in dismissing the complaint and in rendering final judgment for the defendant and in refusing to render judgment for the plaintiffs.

4. The Court erred in holding and deciding that Title II of the Act of Congress of September 8, 1916, does not attempt to create a direct tax without apportioning the same among the several States according to population as required by Article I, Sections 2 and 9, of the Constitution of the United States.

5. The Court erred in holding and deciding that said Title of said Act (if it is not an unconstitutional attempt

to create a direct tax) does not attempt to create a tax in respect of interests received by reason of death and in respect of such interests, to impose different, unequal and widely varying burdens upon persons or property identically, equally and similarly situated, and, in refusing to hold that said Title of said Act is not within the scope of the power to tax or the legislative power conferred upon Congress by the Constitution; and contrary to fundamental principles of free government, expressed and implied by the Constitution of the United States, and a taking of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

6. The Court erred in holding and deciding that said Title of said Act is a valid attempt to impose a tax in respect of interests in property which cease at the death of the owner thereof and in refusing to hold that (if said Title of said Act is not an unconstitutional attempt to create a direct tax or an unconstitutional attempt to create a tax in respect of rights to receive interests in decedents' estates) it is an unconstitutional attempt to create a tax in respect of transfers required by the States as a part of the process of administering decedents' estates and in the exercise of their exclusive power to regulate and control such administration.

7. The Court erred in refusing to hold that said Title of said Act is unconstitutional and void.

8. The Court erred in holding and deciding that the "net estate," defined by Section 203 of said Title of said Act, on which the exaction complained of was computed, could lawfully include any values in excess of the aggregate of the values actually passing to legatees and distributees of said estate.

9. The Court erred in holding and deciding that all payments allowed to plaintiffs in their accounts as executors in their account entitled "a statement of all moneys paid by us for funeral and other necessary expenses of administration of the estate, chargeable against principal," were not deductions required and proper to be made before determining the value of said "net estate," within the meaning of said Section 203 of said Title of said Act.

10. The Court erred in holding and deciding that the inheritance and succession taxes paid to the States of New York, Wisconsin, Kansas, Michigan, Colorado and New Jersey, were not "other charges against the estate allowed by the laws of the jurisdiction . . . under which the estate" was "administered," within the meaning of Section 203 of said Title of said Act, and in refusing to hold that said inheritance and succession taxes were deductions required and proper to be made before determining the value of said "net estate."

11. The Court erred in holding and deciding that Congress has constitutional power to impose a tax in respect of amounts exacted by the States, in the exercise of their exclusive power to regulate and control the administration of decedents' estates, and in refusing to hold (if said Section 203 of said Title of said Act must be interpreted or construed so as to require the inclusion of such exactions in said "net estate") that any Federal tax in respect of such State exactions is unconstitutional and void.

III.

THE ENACTMENT.

A. STATUTES.

The so-called "ESTATE TAX" provisions of the Act of CONGRESS of September 8, 1916, which are statutes directly in issue, with all amendments, including the "ESTATE TAX" sections of the REVENUE ACT OF 1918 (*Act of February 24, 1919, 40 Stat. 1057*) are set forth in full, as an APPENDIX, on pages 221 *et seq.* of this brief.

The issues of the instant proceeding arise directly under Sections 200 to 212 of the unamended Act of September 8, 1916, of which it is to be noted that:—

1. Section 200 (*infra, 221*) is a section of DEFINITIONS.

2. Section 201 (*infra, 221*) ATTEMPTS TO IMPOSE A TAX, the significant words (as the rates of taxation are not immediately important) being

> "That a tax . . . is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, . . ."

3. Section 202 (*infra, 222*) provides what shall be included in the value of the "GROSS ESTATE," being preliminary to Section 203.

4. Section 203 (*infra, 223*) defines the taxable "NET ESTATE," which is to be ascertained by making certain enumerated deductions from the "GROSS ESTATE" defined in Section 202. The deductions differ slightly in the cases of (1) resident and (2) non-resident decedents. As to the former the section reads:—

> "That for the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate—

"(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

"(2) An EXEMPTION of $50,000;"

Section 204 (*infra, 224*) requires PAYMENT within one year from death, rewarding early payment by a discount and penalizing delayed payment.

Section 205 (*infra, 224*) requires RETURNS from administrators and executors and requires the COMMISSIONER OF INTERNAL REVENUE to make assessments.

Section 206 (*infra, 225*) provides for cases in which there is NO ADMINISTRATION, FAILURES TO MAKE RETURNS and FALSE OR INCORRECT RETURNS.

Section 207 (*infra, 225*) requires THE EXECUTOR (the term includes an administrator—*see Section 200*) TO PAY and provides for correcting UNDERPAYMENTS AND OVERPAYMENTS. It includes the following:—

"That the executor shall pay the tax to the collector or deputy collector . . . If the amount so paid exceeds the amount of the tax as finally determined, the Commissioner of Internal Revenue shall refund such excess to the executor . . .

"The collector shall grant to the person paying the tax duplicate receipts either of which shall be sufficient evidence of such payment, and shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts."

Section 208 (*infra, 226*) provides for COLLECTION by forced sale of property and for REIMBURSEMENT of those from whom the tax is collected, under certain conditions, by other interests in the estate. It includes the following:—

"That if the tax herein imposed is not paid within sixty days after it is due, the Collector shall, unless there is reasonable cause for further delay, commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court . . . If the tax or any part thereof is paid by or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

Section 209 (*infra, 227*) attempts to create a LIEN, the portion of present significance reading:—

"That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien."

Section 210 (*infra, 227*) provides PENALTIES for violations of the law.

Section 211 (*infra, 228*) makes applicable the general provisions of the INTERNAL REVENUE SYSTEM, and,

Section 212 (*infra, 228*) (*the last section of this title*) empowers the COMMISSIONER OF INTERNAL REVENUE to make REGULATIONS.

Section 203 (*infra, 223*), considerably revised, is now Section 403 (*infra, 235*) of the REVENUE ACT OF 1918 (*40 Stat. 1057*), approved on February 24, 1919. That part of the REVISED SECTION which replaces the portion of Section 203 previously set forth herein (*supra, 7*) is as follows:—

"That for the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate;

"(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise, and such amounts reasonably required

and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy, or inheritance taxes;

"(2) An amount equal to the value at the time of the decedent's death of any property, real, personal, or mixed, which can be identified as having been received by the decedent as a share in the estate of any person who died within five years prior to the death of the decedent, or which can be identified as having been acquired by the decedent in exchange for property so received, if an estate tax under the Revenue Act of 1917 or under this Act was collected from such estate, and if such property is included in the decedent's gross estate;

"(3) The amount of all bequests, devises, legacies or gifts, to or for the use of the United States, or any State, territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; and

"(4) An exemption of $50,000; . . ."

B. RATES.

THE ORIGINAL RATES of the exaction sought to be applied by Section 201 of the Act of September 8, 1916, ranged from ONE to TEN per cent. Higher rates were provided by the Act of March 3, 1917 (*39 Stat. 1002*), and there were further advances in the Act of October 3, 1917 (*40 Stat. 300*). The rates were revised, with slight reductions as to the smaller estates, by the REVENUE ACT OF 1918 (*40 Stat. 1057*). The following table shows the rates in force during different periods:

Portions or "blocks" of the "net estate," as defined by Section 203 of Act of September 8, 1916, and Section 403 of Act of February 24, 1919.		Rate of the exaction (per cent)			
		September 9, 1916, to March 2, 1917.	March 3, 1917, to October 3, 1917.	October 4, 1917, to Feb. 24, 1919.	February 25, 1919, and thereafter
First	$50,000	1	1½	2	1
Next	100,000	2	3	4	2
"	100,000	3	4½	6	3
"	200,000	4	6	8	4
"	300,000	5	7½	10	6
"	250,000	5	7½	10	8
"	500,000	6	9	12	10
"	500,000	6	9	12	12
"	1,000,000	7	10½	14	14
"	1,000,000	8	12	16	16
"	1,000,000	9	13½	18	18
"	1,000,000	10	15	20	20
"	1,000,000	10	15	20	20
"	1,000,000	10	15	20	20
"	1,000,000	10	15	22	22
"	1,000,000	10	15	23	23
"	1,000,000	10	15	25	25

IV.

ARGUMENT.

A.

PRELIMINARY STATEMENT.

THE ARGUMENT divides itself into (1) those considerations which bear upon the CONSTITUTIONALITY of the so-called "tax" and (2) those considerations which affect the INTERPRETATION of Section 203.

Observing this natural separation the argument will deal successively with—

1. The CONSTITUTIONAL question (*infra, 13*), and.
2. The question of INTERPRETATION (*infra, 181*).

ONLY ONE CASE in any way involving the "ESTATE TAX" provisions of the Act of September 8, 1916, has hitherto been presented in this COURT. That case, *United States* v. *Field, not yet reported,* was decided on February 28, 1921. It was held that the whole amount sued for should be refunded to the taxpayer. The only question presented or considered was whether property in which the decedent held a general power of appointment should be considered part of his "gross estate," under *Section 202.* No CONSTITUTIONAL question and no question as to the INTERPRETATION of *Section 203* was raised or discussed.

B.

THE CONSTITUTIONAL QUESTION.

The UNITED STATES have power to impose death duties in the form of inheritance and succession taxes, *i. e.*, taxes levied in respect of the *exercise* of rights to receive

legacies and distributive shares of personal property, probably also in respect of the right to take real property by devise and inheritance. *Scholey* v. *Rew*, *23 Wall. 331*; *Knowlton* v. *Moore*, *178 U. S. 41*. The objection here made to the Act of September 8, 1916, does not rest upon denial of the authority of CONGRESS to provide for obtaining revenue by resort to death duties. That power, *i. e.*, the power to reach this subject-matter by FEDERAL taxation, is finally established. But it will be argued herein that the attempt to impose death duties evidenced by the Act of September 8, 1916 (*Section 200 et seq.*), is CONSTITUTIONALLY defective on account of the intrinsic character and inevitable results of this particular effort towards the exertion of legislative power.

> "Not power, it must be borne in mind, but the manner of its use, is the only issue presented in this case." *Pollock* v. *Farmers' Loan & Trust Co.* (*dissenting opinion*), *157 U. S. 429, 614*.

In support of the view suggested the following propositions will be successively examined:

First.—No government can acquire the private property of any individual except (1) by purchase; (2) by voluntary donation by the owner; (3) by exacting it as a penalty for violation of some rule of conduct prescribed by law; (4) by exercise of the power of eminent domain; (5) by exchanging therefor some property, privilege or service which the government is permitted to sell; (6) by exercise of the power of taxation, or (7) by mere unjustifiable expropriation. The exaction complained of herein must belong to one of the last three categories. (*Infra, 17*).

Second.—If the exaction complained of is a price, it must be for some privilege related to the transmission of

property from the dead to the living, but such privileges are not at the disposal of the United States and they are without power to demand a consideration therefor. (Infra, 19).

Third.—If the exaction complained of is a tax, it is not a tax of the kind upheld in Scholey v. *Rew, 23 Wall. 331, and Knowlton* v. *Moore, 178 U. S. 41 (Infra, 22).*

Fourth.—If the exaction complained of is a tax, it is an usurpation of the sovereign power of the States to regulate descent and distribution and therefore unconstitutional and void, regardless of its classification as direct or indirect (Infra, 35).

1. The power to regulate descent and distribution is a sovereign power and belongs exclusively to the States (Infra, 36).

2. Death duties, in certain of their forms, are essentially a manifestation of the power to regulate descent and distribution (Infra, 40).

3. Sovereign power to regulate any subject-matter may have (a) positive expression in rules, requirements or requisitions established by legislative authority or (b) negative expression in the absence of such rules, requirements or requisitions, the absence of any particular class of rules, requirements or requisitions indicating the legislative will that, in that aspect, the subject-matter shall be free from regulative restraint and requisition. The sovereign power of a State to regulate descent and distribution will always be found to have been expressed, in the matter of the requisition of death duties of the kind which are essentially a manifestation of such power, either (a) in the requisition of such death duties or (b) in the absence of any such

requisition, thus indicating the will of the State that there shall be no such requisition (Infra, 50).

4. *The taxing power of the United States cannot constitutionally be so exercised as to amount to a usurpation of any sovereign power belonging to the States. If the United States could constitutionally impose death duties in any form in which such requisitions are essentially a manifestation of the sovereign power to regulate descent and distribution, this would amount to the usurpation of a sovereign power belonging to the States (Infra, 52).*

5. *The death duty attempted to be imposed by the Act of September 8, 1916, is in such form that, if valid, it would be essentially a manifestation of the sovereign power to regulate descent and distribution (Infra, 56).*

Fifth.—If the exaction complained of is a tax in respect of the transfer of the whole estate it must relate to the transfer to the personal representatives and therefore be an unconstitutional attempt to tax an essential step lawfully required by the States in the exercise of their exclusive power over descent and distribution (Infra, 66).

Sixth.—If the exaction complained of is a tax in respect of the transfer to those beneficially entitled or an income tax, it is unconstitutional because of its gross and capricious inequalities (Infra, 97).

Seventh.—If the exaction complained of is a tax it must be a direct tax and unconstitutional because not apportioned according to population (Infra, 139).

1. *It lacks the essential characteristics of an excise tax, as it affects the estate of every decedent, does not*

rest upon any right or privilege and the demand is absolute and unavoidable (Infra, 142).

2. It is a tax upon property by reason of its ownership (Infra, 151).

3. The words "the transfer of" in the phrase "is hereby imposed upon the transfer of the net estate of every decedent" have no practical effect and cannot overcome the actual character of the exaction (Infra, 162).

4. It would be void if it were a capitation tax (Infra, 168).

Eighth.—The exaction complained of is a mere unjustifiable taking of private property without due process of law (Infra, 169).

Ninth.—This act of legislation, if otherwise unconstitutional, can not be made constitutional by showing that the objections to its constitutionality were not pressed in respect of somewhat similar but far less burdensome exactions imposed by a prior statute (Infra, 171).

FIRST.

No Government can acquire the private property of any individual except (1) by purchase: (2) by voluntary donation by the owner: (3) by exacting it as a penalty for violation of some rule of conduct prescribed by law: (4) by exercise of the power of eminent domain: (5) by exchanging therefor some property, privilege or service which the Government is permitted to sell: (6) by exercise of the power of taxation, or (7) by mere unjustifiable expropriation. The exaction complained of herein must belong to one of the last three categories.

The foregoing is self-evident. The relation of the sovereign to *property which has no owner*, carrying with

it potential acquisition of title, has been omitted, for the reason that this attribute of sovereignty seems to reside in the several STATES and not in the UNITED STATES. The money sought to be recovered in this proceeding was not (1) purchased, (2) donated to the UNITED STATES or to DEFENDANT-IN-ERROR, it was not (3) claimed and cannot be considered as a penalty, it was not (4) taken (even if money can ever be so taken) under the power of eminent domain. That the exaction was none of these is so plain as to preclude further examination.

PLAINTIFFS-IN-ERROR are unable to attribute the exaction complained of to (5) the power to require payment for a privilege or service or (6) to the power of taxation and, therefore, *by the negative logic of exclusion*, as well as for positive reasons that will be stated hereinafter, are impelled to the conclusion that the exaction was (7) a mere unjustifiable expropriation.

It is recognized, however, that the last three categories will require closer scrutiny. For the purposes of this argument the exaction complained of will be considered successively as though belonging to each of them. It will therefore be considered—

As a PRICE (*infra, 19*),

As a TAX (*infra, 21*), and

As an UNJUSTIFIABLE TAKING (*infra, 169*).

The several propositions of CONSTITUTIONAL law set forth in the outline of argument (*supra, 13*) will now be examined in order.

CONSIDERED AS A PRICE.

SECOND.

If the exaction complained of is a price, it must be for some privilege related to the transmission of property from the dead to the living, but such privileges are not at the disposal of the United States and they are without power to demand a consideration therefor.

THE STATES, whose power to regulate descent and distribution is plenary and exclusive (*Yonley* v. *Lavender*, *21 Wall. 276; Baker* v. *Baker, Eccles and Company, 242 U. S. 394, 400-1*), can withhold or restrict (*Maxwell* v. *Bugbee, 250 U. S. 525; Plummer* v. *Coler, 178 U. S. 115*) or grant privileges in connection therewith, including those commonly called rights to transmit or to receive by testate or intestate succession, and if they choose, can condition the exercise of these privileges, or any of them, upon the payment of a price. Thus MR. JUSTICE BROWN, who spoke for the majority of this COURT, MR. JUSTICE HARLAN alone dissenting, in *United States* v. *Perkins, 163 U. S. 625*, quoted *State* v. *Dalrymple, 70 Md. 294, 299*, in order to say:—

> "This, therefore, . . . is merely the price exacted by the State for the privilege accorded in permitting property so situated to be transferred by will or by descent or distribution." *163 U. S. 625, 629.*

In the case quoted it was held that the death duty exacted by the STATE OF NEW YORK was enforceable in respect of a legacy to the UNITED STATES. The opinion leaves no doubt that the right to demand the price was derived solely from the power to regulate, an authority which had previously been held to extend to the withholding of power to make the UNITED STATES a devisee (*United States* v. *Fox, 94 U. S. 315*).

Obviously, in this respect, the STATE power to exact death duties may be, and it often is, a special manifestation of the general principle that the power which can grant, withhold or regulate, at will, may make its grant conditional or upon terms or exact a price for that which it permits.

> "The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it." *Maxwell* v. *Bugbee, 250 U. S. 525, 540.*

The UNITED STATES have no such authority.

> "Of course, in considering the power of Congress to impose death duties, we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation, as the right to regulate successions is vested in the States and not in Congress." *Knowlton* v. *Moore, 178 U. S. 41, 58.*

> "In other words, we defined the nature of the tax; we did not prescribe the time of its imposition. To have done the latter would have been to prescribe a rule of succession of estates, and usurp a power we did not and do not possess." *Cahen* v. *Brewster, 203 U. S. 543, 551.*

Recognition of the principle that the UNITED STATES cannot impose death duties as a price conditioning the exercise of privileges not at their disposal in no way questions FEDERAL authority to derive revenue from "a usual subject of taxation." *Knowlton* v. *Moore, 178 U. S. 41, 58.* It is perfectly consistent with the principle that a CONSTITUTIONAL system of FEDERAL taxation of inheritances may indirectly diminish the value of rights to inherit arising under STATE law.

"Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the law, the value of the right to inherit or receive, but this is a burden cast upon the recipient and not upon the power of the State to regulate." *Knowlton* v. *Moore, 178 U. S. 41, 60.*

If, therefore, it were necessary to consider the exaction complained of in this proceeding as a price demanded or a condition imposed, the want of CONGRESSIONAL power would have been established.

CONSIDERED AS A TAX.

THE NEXT STEP involves examination of the exaction on the assumption that it must be considered as a tax.

If the exaction complained of is a tax, it is considered that it is an usurpation of the power of the STATES to regulate descent and distribution and that it is, therefore, quite unnecessary, as the FEDERAL government cannot CONSTITUTIONALLY lay any burden upon the exercise of the sovereign powers of the STATES, to inquire whether it should be classed as direct or indirect (*Infra, 35*). But beyond this, it is obvious that it must be either—

1. A DIRECT TAX and void because not constitutionally apportioned (*infra, 139*),

2. An EXCISE TAX in respect of the transmission or receipt of estates or portions of estates of decedents (*infra, 56, 66, 97*), or,

3. An INCOME TAX (*infra, 97*).

In order *to leave no conceivable classification without examination* the "ESTATE TAX" provisions of the Act of September 8, 1916, will be tested, successively, on the hypothesis that the exaction should be assigned to each

of the foregoing classes. If it shall be found that it could be CONSTITUTIONALLY justified in *none* of them it must follow, as it has been shown that it could not be supported as a price or condition, that it is UNCONSTITUTIONAL AND VOID. It will first be argued, however, that it is not a tax of the sort sustained in *Scholey* v. *Rew, 23 Wall. 331,* and *Knowlton* v. *Moore, 178 U. S. 41.*

THIRD.

If the exaction complained of is a tax, it is not a tax of the kind upheld in Scholey v. Rew, 23 Wall. 331, and Knowlton v. Moore, 178 U. S. 41.

THE OPINION of the learned DISTRICT JUDGE, from whose decision this appeal was taken, says:—

> "Clearly the tax is not . . . on the individual legacies or on the right of the individual legatees to receive them, measured by the entire net estate, but on the right of decedent to have the estate pass by will or intestacy." *R. 11; 263 Fed. 620, 621.*

The exaction here complained against would not be like the taxes sustained in *Scholey* v. *Rew, supra,* and *Knowlton* v. *Moore, supra,* if it were, either:—

> 1. "Not on the individual legacies or on the right of the individual legatees to receive them,"
>
> 2. "Measured by the entire net estate," or,
>
> 3. "On the right of the decedent to have the estate pass by will or intestacy."

The second of the foregoing distinctions was certainly correctly stated. The others will be the subject of further inquiry herein. Sections 201, 202 and 203 (*Infra, 221-4*) of the Act make it perfectly plain that CONGRESS

did intend that the tax should be "measured by the net estate" (*supra, 22*). Moreover, the report of the Committee on Ways and Means of the House of Representatives, submitting its recommendations in favor of the revenue measure which included these sections, said:

> "Thirty States have laws imposing inheritance or share taxes both upon direct and collateral heirs. Twelve other States have laws imposing inheritance taxes upon collateral heirs. Your committee deemed it advisable to recommend a Federal estate tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees. The Federal estate tax recommended forms a well-balanced system of inheritance taxation as between the Federal government and the various States, and the same can be readily administered with less conflict than a tax based upon the shares." *Report No. 922, 64th Congress, 1st session, p. 5.*

At this stage of the discussion it is especially necessary to avoid the source of uncertainty pointed out by the decision in *Knowlton* v. *Moore, 178 U. S. 41.*

> ". . . confusion . . . arises from not keeping in mind the distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death, the two being different objects of taxation." *178 U. S. 41, 77.*

The inheritance and succession tax of the Civil War period (*Act of June 30, 1864; 13 Stat. 218, 287*) under consideration in *Scholey* v. *Rew, supra*, and the inheritance tax of the Spanish War period (*Act of June 13, 1898, 30 Stat. 448*), considered in *Knowlton* v. *Moore, supra*, were not in violation of the Constitutional regula-

tions for the reason that they were excise taxes *imposed in respect of the exercise of the right to receive* property by testate or intestate succession.

In the first of these cases it was noted that if there had been a disclaimer by the person beneficially entitled the interest might have passed differently and a different situation as to the tax would have resulted. *Scholey* v. *Rew, 23 Wall. 331, 351.*

> "*Scholey* v. *Rew, 23 Wall. 331,* was the case of a succession tax which the Court held to be 'plainly an excise tax or duty upon the devolution of the estate or the right to become beneficially entitled to the same, or the income thereof, in possession or expectancy.'" *Pollock* v. *Farmers' Loan and Trust Co., 157 U. S. 429, 577.*

> ". . . the Internal Revenue Act of 1864 . . . imposed a succession tax on 'all dispositions of real estate, taking effect upon the death of any person.' It was not apportioned and would have been void if a tax on property. But it was held that 'it was not a tax on land,' since 'the succession or devolution of the real estate is the subject-matter of the tax . . . whether . . . effected by will, deed, or law of descent.' *Scholey* v. *Rew, 23 Wall. 331, 347, cited and followed, Knowlton* v. *Moore, 178 U. S. 41, 78-81.*" *Keeney* v. *New York, 222 U. S. 525, 534.*

The CONSTITUTIONALITY of these taxes was sustained, but no decision goes farther than to hold that the *right to receive* an inheritance, distributive share, devise or legacy, is a right *the exercise of which* may be subjected to a FEDERAL tax. Nothing could make clearer the fact that the taxes thus sustained were upon the *exercise* of rights than the language in which, in *Knowlton* v. *Moore, supra,* the fallacious reasoning on which they were al-

leged to burden the STATE power to regulate descent and distribution was answered and exposed. Of that argument, it was said:—

> ". . . the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation by either the government of the United States on the one hand or the several States on the other, the *exercise of such rights* as regulated can alone be taxed by the government having the mission to regulate." *178 U. S. 41, 59.*

The argument thus summarized, if admitted, would as the opinion notes, have deprived the STATES and the NATION of acknowledged objects of taxation and was plainly unsound. Not so, however, the objections to the instant exaction, which do not deny the power of CONGRESS to impose death duties, but merely insist that when it does so it must adopt a method which does not burden or interfere with admitted and exclusive State powers and must not impose a direct tax except in accordance with the CONSTITUTIONAL regulation requiring apportionment.

Moreover, the taxes sustained in *Scholey* v. *Rew*, *supra*, and *Knowlton* v. *Moore*, *supra*, were imposed in respect of rights to receive and measured by the value of these rights, when and as exercised:—

> ". . . the statute clearly imposes the duty on the particular legacies or distributive shares and not on the whole personal estate." *Knowlton* v. *Moore, 178 U. S. 41, 65.*

And it was held, as to the FEDERAL taxes, that neither the CIVIL WAR nor the SPANISH WAR tax attached at the date of the death of the person from whom the property passed, as STATE inheritance taxes are commonly held to

attach (*Jackson* v. *Myers*, *257 Pa. St. 104, 108; Estate of Hazard, 228 N. Y. 26, 31*), but at some point when from the process of administration or distribution *there emerged an immediate right on the part of a beneficiary to possess or enjoy* (*Clapp* v. *Mason, 94 U. S. 589; Mason* v. *Sargeant, 104 U. S. 689, 591-3; Sturges* v. *United States, 117 U. S. 363; Vanderbilt* v. *Eidman, 196 U. S. 480, 500-1; United States* v. *Jones, 236 U. S. 106; McCoach* v. *Pratt, 236 U. S. 562; Uterhart* v. *United States, 240 U. S. 598; Sage* v. *United States, 250 U. S. 33*).

The essentials of the taxes approved in *Scholey* v. *Rew*, *supra*, and *Knowlton* v. *Moore*, *supra*, were (1) that they were imposed in respect of the exercise of rights to receive beneficial interests, (2) that they were proportioned to the value of the interests thus affected (if not so proportioned they would probably have been invalid for reasons fully stated in *Knowlton* v. *Moore*, *178 U. S. 41, 76-7*, but this suggestion will be examined at another point in this brief, *infra*, *97*), (3) that they attached when a beneficial right to possess or to enjoy accrued and (4) that they were deducted from the particular interests to which they attached.

> "If it is deducted from each particular legacy, then it is manifest that the tax imposed will have been levied, not upon the mass of the estate, but upon each particular legatee or beneficiary, since the share of such person will have paid a rate of taxation predicated upon the amount of the legacy and the relationship, or want of relationship, of the particular recipient thereof to the deceased. This being the case, no room would be left for the contention that the tax was imposed on the whole estate." *Knowlton* v. *Moore*, *178 U. S. 41, 66*.

The exaction here in issue was imposed, or attempted

to be imposed, upon, or in respect of, the whole estate. The Act, Section 201, reads, in part:—

> "That a tax . . . is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, . . ."

The words "net estate," in the foregoing, constitute a statutory term, made definite by Sections 202 and 203 (the former defining the "gross estate"). The amount of this "net estate" is to be determined by deducting from the "gross estate," certain specified items, that may roughly be described as the charges that customarily reduce the gross estate to the amount available for distribution, and an exemption of $50,000. The amount of the "tax" provided for is in no way affected by the distribution of the net estate. This is absolutely true as to the Act of September 8, 1916 (the only statute directly involved in this proceeding), although the corresponding section (*403*) of the Revenue Act of 1918, *infra*, *235*, permits the deduction, for the purpose of establishing the taxable net estate, of amounts passing to American bodies politic and those devoted to certain charitable and educational uses.

The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, has officially defined the exaction under discussion, saying:—

> "This is not an inheritance tax, and the interests of separate beneficiaries and the manner of their taking have no bearing upon the question of liability to tax or the amount of tax due. This is a transfer tax in a lump sum resting upon the decedent's whole net estate computed according to sections 202 and 203 of the Act." *Internal Revenue Regulations 37; May, 1917; Article IV.*

In the 1919 edition of *Regulations 37*, the foregoing was replaced by the following:

"The Federal estate tax is imposed upon the transfer of the net estate, determined in the manner prescribed, of every person dying after September 8, 1916. The tax is not laid upon the property, but upon its transfer from the decedent to others. The subject of tax is the transfer of the entire net estate, not any particular legacy, devise or distributive share. It is not an individual inheritance tax. The value of the separate interests and the relationship of the beneficiary to the decedent have no bearing upon the question of liability or the extent thereof. The transfer of property is taxable, although it escheats to the State for lack of heirs." *Internal Revenue Regulations 37; Revised, 1919; Article 1; Repeated in the revision of January, 1921.*

GLEASON & OTIS, in their "*Treatise on the Law of Inheritance Taxation*," discussing the present FEDERAL "ESTATE TAX," declare that:—

"The distinguishing feature of the present Federal statute is that it proceeds upon a different theory from all prior Federal inheritance taxes and from that of all but two of the States.

"It levies the tax on the entire estate of the decedent without reference to the beneficiaries or their interests. . . .

"The whole scheme of the law would seem to be to impose oppressive, if not confiscatory, rates on large estates, with no provision for the adjustment of burdens. . . .

"It is 'not an inheritance tax.' *Art. IV Department Regulations, (1916)*. That is to say, the tax is on the right to transmit property from the dead, not on the right to receive it from the dead. It is,

therefore, not a tax upon the succession or inheritance, but is imposed upon the estate." *2d ed., pp. 553-4.*

Mr. ARTHUR W. BLAKEMORE, one of the authors of BLAKEMORE and BANCROFT on *Inheritance Taxation*, has referred to this statute as follows:

> "Its outstanding feature is that it is imposed on the estate itself, instead of on the shares of each beneficiary, and at a progressive rate. . . .
>
> "There is no possible ambiguity in this respect in the act of 1916. It is clearly and unmistakably a tax with progressive rates based on the size of the estate alone." *Trust Companies Magazine, July, 1917.*

The nature of this exaction has received consideration by STATE courts which have been required to determine (1) whether it should be deducted before the assessment of STATE taxes on inheritances and (2) whether its burden should be apportioned among the beneficiaries of testate decedents or borne by their residuary estates. In *Plunkett* v. *Old Colony Trust Company, 233 Mass. 471*, in which it was held payable before distribution, and therefore not apportionable among the legatees, the COURT said:—

> "The sections of the Act . . . refer exclusively to the value of the 'net estate' as the basis for the ascertainment of the tax. There is no mention whatever in this connection of legacies, devises or distributive shares. They are wholly omitted. The statute ignores utterly the disposition made of the estate by the testator or by the law as to intestate property and looks only to the net estate itself, as defined . . .
>
> "An estate tax as distinguished from a legacy or succession tax is well recognized. . . .

"The conclusion seems to us to follow irresistibly that the tax here in question is an estate and not a legacy or succession tax." *233 Mass. 471, 473-5.*

The SUPREME COURT OF PENNSYLVANIA affirmed the decision of the ORPHANS' COURT for PHILADELPHIA county, holding that the FEDERAL tax should be deducted before computing the STATE tax on successions, "on the opinion of the learned court below," which included the following reference to the former:

"This tax is . . . imposed without regard to the provisions of the will or the law of the several States, the paramount taxing power of the Federal government takes effect at the moment of the owner's death upon his entire estate, subject only to the specific deductions mentioned in Section 203, and an exemption of $50,000 and it requires payment therefrom of a tax according to a graduated scale regulated by the net amount of the taxable estate." *Knight's Estate, 261 Pa. St. 537, 538.*

In NEW JERSEY, a decision to the same effect as the foregoing says:

"The sub-title of the Act 'Estate Tax,' is significantly descriptive, and a persuasive indication of the class of death duties Congress was dealing with; and upon looking into the twelve sections comprising the legislation, all doubt vanishes regarding the particular transfer upon which the tax is imposed.

"The value of the net estate is the unit of taxation. This includes the real estate devised or descending as well as the personal property passing to the executor . . . The tax is to be paid . . . out of the personal estate before distribu-

tion, . . . There is no apportionment of it among the various transferees, nor is the real estate, devised or descending, liable to contribution . . . To be more precise, it is imposed upon the *estate* transferred by death, and not upon the succession resulting from death." *Estate of Roebling, 89 N. J. Eq. 163, 165-6.*

The Court of Appeals of New York, holding that the burden of the Federal tax must fall wholly upon residuary legatees, said:

> "That the Congress did intend by the law of 1916 to impose a tax on the net value of the estate of a decedent at a flat rate dependent upon the amount of the same, rather than upon legatees or distributees, is evident by a comparison of the Act of 1916 with the Act of 1898.
>
> ". . . the Act imposes an 'estate tax' as distinguished from an inheritance tax, . . ." *Matter of Hamlin, 226 N. Y. 407, 413-6.*

See, also:

United States v. *Field,—U. S.—, decided on February 28, 1921;*
Estate of Hazard, 228 N. Y. 26, 30;
Matter of Sherman, 179 App. Div. 497, affirmed, 222 N. Y. 540;
Matter of Bierstadt, 178 App. Div. (N. Y.) 836;
Estate of Brady, N. Y. Law Journal, January 11, 1919;
People v. *Pasfield, 284 Ill. 450, 453-4;*
Fuller v. *Gale, 78 N. H. 544, 546;*
State v. *Probate Court, 139 Minn. 210;*
Randolph v. *Craig, 267 Fed. 993, 995.*

The salient features of the exaction under consideration are, therefore:—

1. That it is imposed upon the entire estate of "every decedent,"

2. That there is a single and uniform exemption of $50,000 applicable to all estates,

3. That it inevitably results from ownership and death—no action or omission to act by the owner decedent or by anyone having a real or potential interest in the estate can avoid it,

4. That the rates are progressive, depending upon the whole amount of the estate,

5. That the amount exacted is not affected by the distribution of the estate, whether by will or under the intestate laws, and

6. That the exaction applies even though there be no distribution of the estate (*i. e.*, if it escheats).

7. It will be hereinafter noted (*infra, 181*) that the COMMISSIONER OF INTERNAL REVENUE (and DEFENDANT-IN-ERROR in this proceeding) claims that the exaction is not diminished even in the proportion that the STATE, in the exercise of its exclusive power to regulate the distribution of decedents' estates, denies power to transmit either by will or under intestate laws, taking out its toll before conceding the privilege as to the balance of the estate.

It seems, therefore, that the only FEDERAL death duties which have heretofore received judicial sanction are distinguished from the exaction now under examination in that the former were all of the class of succession taxes. The definition of such taxes, adopted from HANSON'S *Death Duties* (*4th Ed. p. 40*) follows:—

"Succession duty is a tax placed on the gratuitous acquisition of property which passes on the death of any person, by means of a transfer (called either a disposition or a devolution) from one person (called the predecessor) to another person (called the successor)." ***Knowlton* v. *Moore*, *178 U. S. 41, 48.***

On the other hand, the exaction provided for by Sections 200 *et seq.* of the Act of September 8, 1916, is similar in all respects to the estate duty, also defined by HANSON. His comment on this form of taxation (*4th Ed. p. 63*), also adopted by this COURT, is as follows:

"The new duty imposed by the Finance Act, and called estate duty, as has been said above, superseded probate duty; but the key to the construction of the Finance Act lies in remembering that the new estate duty, although it is leviable on property which was left untouched by probate duty, such as real estate, yet is in substance of the same nature as the old probate duty. What it taxes is not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death. Unless this principle is kept clearly in view, the mind is constantly tempted by the wording of the Act to revert to principles of succession duty which have no real connection with the subject." *178 U. S. 41, 49.*

Bearing in mind the assertion in the foregoing that the substantial nature of the tax described is the same as that of the probate duty which it superseded, it seems significant that, in the sentence immediately following, the author asserts that the latter was ***"the price of obtaining probate."***

"Probate duty was levied in respect of all per-

sonal property within the jurisdiction of the Probate Court of which the deceased was free to dispose, it was in fact the price of obtaining probate; . . ." *4th Ed. p. 63.*

Moreover, HANSON in terms declares that the estate duty is a tax on the property left by the deceased.

> ". . . the scheme of the Act is to tax not the *interest* which has ceased, but the *property* out of which the interest was enjoyed." *4th Ed. pp. 66-7.*

In the sixth edition of HANSON (1911) the last three extracts appear (*pp. 1-2, 5*) with no material change, except *a very significant revision of the second sentence* in the first of them. In the fourth edition this sentence (*as quoted above*) reads:

> "What it taxes is not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death." *p. 63; 178 U. S. 41, 49.*

In the sixth edition the foregoing has been replaced by the following:

> "What it taxes is not the interest to which some person succeeds on a death, but *the property in respect of which* an interest ceased by reason of the death." *p. 2.*

This change in phraseology was doubtless made in order fully to reconcile the text with the conclusions of the HOUSE OF LORDS in *Winans* v. *Attorney General, L. R. App. Cas. (1910) 27,* in which the LORD CHANCELLOR said:

> "Estate duty falls upon the property passing at death, apart from its destination." *p. 30.*

See, also:

Attorney General v. *Beech, L. R. App. Cas. (1899), 53, 56; infra, 155.*

It is apparent, therefore, that the present exaction is intrinsically and radically different from the taxes sustained in *Scholey* v. *Rew, supra,* and *Knowlton* v. *Moore, supra.* Hence no conclusion in favor of its validity is supported by those decisions.

American decisions holding that the exaction here in issue is identical with the English probate or estate duty are cited later in this brief (*infra, 156*).

FOURTH.

If the exaction complained of is a tax it is an usurpation of the sovereign power of the States to regulate descent and distribution and therefore unconstitutional and void, regardless of its classification as direct or indirect.

1. *The power to regulate descent and distribution is a sovereign power and belongs exclusively to the States. (Infra, 36).*

2. *Death duties, in certain of their forms, are essentially a manifestation of the power to regulate descent and distribution (Infra, 40).*

3. *Sovereign power to regulate any subject-matter may have (a) positive expression in rules, requirements or requisitions established by legislative authority or (b) negative expression in the absence of such rules, requirements or requisitions, the absence of any particular class of rules, requirements or requisitions indicating the legislative will that, in that aspect, the subject-matter shall be free from regulative restraint or requisition. The sovereign power of a State to regulate descent and distribu-*

tion will always be found to have been expressed, in the matter of the requisition of death duties of the kind which are essentially a manifestation of such power, either (a) in the requisition of such death duties or (b) in the absence of any such requisition, thus indicating the will of the State that there shall be no such requisition. (*Infra, 50*).

4. *The taxing power of the United States cannot Constitutionally be so exercised as to amount to an usurpation of any sovereign power belonging to the States. If the United States have attempted to impose death duties in a form in which such requistions are essentially a manifestation of the sovereign power to regulate descent and distribution, this is an attempted usurpation of a sovereign power belonging to the States* (*Infra, 52*).

5. *The death duty attempted to be imposed by the Act of September 8, 1916, is in such form that, if effective, its enactment would be an usurpation of the sovereign power to regulate descent and distribution* (*Infra, 56*).

If the secondary propositions of law which are set forth above can be separately sustained, the validity of the *main* proposition to which they are made subordinate will probably be considered as established. These *secondary* propositions will be considered in their order.

Fourth.—1. The power to regulate descent and distribution is a sovereign power and belongs exclusively to the States.

Deciding, in *United States* v. *Fox, 94 U. S. 315*, that a devise to the United States of real estate situated in New York was invalid, under a statute authorizing such devises to persons possessing lawful capacity to hold real estate and to corporations entitled to take by their charters or by statute, this Court said:

"The power of the State to regulate the tenure of real property, within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted . . . The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal government. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal government was created, and would seriously embarrass the landed interests of the State." *94 U. S. 315, 320-1.*

The most diligent examination of the decisions will fail, it is believed, to reveal any suggestion that the power to control the descent and distribution of personal property is an attribute of sovereignty less completely and exclusively reserved to the STATES than that as to real estate established by the foregoing. In *Plummer* v. *Coler, 178 U. S. 115*, objections to the exaction of the NEW YORK inheritance tax in respect of a legacy of UNITED STATES bonds, these bonds being protected against STATE taxation by a valid FEDERAL statute were met by the assertion of this power and the tax was sustained.

"Without undertaking to go beyond what has already been decided by this Court in *Mager* v. *Grima, 8 How. 490;* in *Scholey* v. *Rew, 23 Wall. 331;* and in *United States* v. *Perkins, 163 U. S. 625* . . . We may regard it as established that the relation of the individual citizen and resident to the State is such that his right, as the owner of property, to direct its descent by will or by permitting its

descent to be regulated by the statute, and his right as legatee, devisee or heir, to receive the property of his testator or ancestor are rights derived from and regulated by the State. . . ." *178 U. S. 115, 137.*

Directly applicable to the point under examination appears the decision in *Tilt* v. *Kelsey, 207 U. S. 43,* in which it was held, Mr. Justice Harlan dissenting but without an opinion, that the final decree of distribution of a New Jersey court was a bar to a subsequent claim of the State of New York to recover its death duties in respect of the estate affected, even though the New York courts were held not to be bound by the determination of the New Jersey court that the decedent was domiciled in the latter State. The opinion, by the late Mr. Justice Moody, says:—

> "In respect to the settlement of the successions to property on death the States of the Union are sovereign and may give to their judicial proceedings such conclusive effect, subject to the requirements of due process of law and to any other constitutional limitation which may be applicable." *207 U. S. 43, 56.*

This sovereign power to regulate descent and distribution, being among the powers reserved to the States, it is one upon which the United States may not intrude. It cannot constitutionally be exercised or its exercise in any degree impeded by the Federal authority.

> "Yet every State has a sphere of action where the authority of the National government may not intrude. Within that domain the State is as if the Union were not. Such are the checks and balances in our complicated but wise system of State and National polity." *Farrington* v. *Tennessee, 95 U. S. 679, 685.*

See, also:

> *Worcester* v. *Georgia*, *6 Pet. 515, 570;*
> *New York* v. *Miln*, *11 Pet. 102, 138;*
> *Yonley* v. *Lavender*, *21 Wall. 276;*
> *United States* v. *Fox*, *94 U. S. 315;*
> *Robertson* v. *Pickrell*, *109 U. S. 608;*
> *Byers* v. *McAuley*, *149 U. S. 608, 612-3, 615;*
> *Knowlton* v. *Moore*, *178 U. S. 41, 56, 58;*
> *Snyder* v. *Bettman*, *190 U. S. 249, 252;*
> *McCray* v. *United States*, *195 U. S. 27, 59;*
> *Cahen* v. *Brewster*, *203 U. S. 543, 551;*
> *Tilt* v. *Kelsey*, *207 U. S. 43, 56;*
> *Baker* v. *Baker, Eccles & Company*, *242 U. S. 394, 400-1;*
> *Hammer* v. *Dagenhart*, *247 U. S. 251, 275.*

"The people of the United States resident within any State are subject to two governments: one State, and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad." *United States* v. *Cruikshank*, *92 U. S. 542, 550.*

In a case in which it was considered necessary to protect the STATES against an invasion of their sovereignty under the guise of taxation it was said:—

"It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. . . .

"The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States." *Collector* v. *Day*, *11 Wall. 113, 124.*

The sovereign quality of the power in question and the supremacy of the STATES in its exercise would seem to have been established.

Fourth.—2. Death duties, in certain of their forms, are essentially a manifestation of the power to regulate descent and distribution.

THE BOUNDARIES of the foregoing proposition should not be overlooked. It is not contended and will not be contended in this brief that *all* death duties are regulations of descent and distribution. It is freely admitted that such duties may take the form of excise taxes upon the exercise of rights to receive property by descent or distribution, the delimitation of such rights being left to the authority of the STATES and that, in this form, such taxes may rest wholly and sufficiently upon the taxing power and, therefore, involve no interference with, or impairment of, the power of any STATE to control testate or intestate successions. This is the principle sanctioned by *Scholey* v. *Rew*, *23 Wall. 331*, and *Knowlton* v. *Moore*, *178 U. S. 41*. It is not a regulation of descent and distribution to tax "*the exercise of such rights as regulated*" (*178 U. S. 41, 59*), *i. e.*, after the process of regulation has eliminated from the mass of an estate a definite

legacy or share, to tax the transmission or receipt of such result of the operation of an exclusive STATE power. Obviously to tax transmission or receipt is to tax *the exercise of the right to receive.* For there is no transmission without receipt and no receipt until volition on the part of a recipient has led to the *exercise of the right to receive.* The verb "to receive" is always active and never passive (*Billings* v. *United States, 232 U. S. 261, 281.* Receipt necessarily involves the act of receiving and *is* exercise of the right to receive.

But it is submitted that while, in certain of their forms, death duties may derive support wholly from the taxing power, they have in many instances assumed forms that, in order to be valid, must rest upon the entirely distinct power to regulate descent and distribution. Furthermore, it is believed to be true, not only that some death duties must find their entire support in this STATE power, but that others, which may seem in form to be taxes, may effectively and substantially regulate descent and distribution. Taxes constitute a recognized means of regulation. This was noted in denying, in *Philadelphia & Southern Steamship Co.* v. *Pennsylvania, 122 U. S. 326,* the right of a STATE to tax the gross receipts of a steamship company engaged in interstate and foreign commerce, this COURT, by the late MR. JUSTICE BRADLEY, saying:

> ". . . it cannot be pretended that the State could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms." *122 U. S. 326, 336.*

See, also:

> *Telegraph Co.* v. *Texas, 105 U. S. 460, 466;*
> *Woodruff* v. *Parham, 8 Wall. 123, 138;*
> *Edge* v. *Robertson, 112 U. S. 580.*

In the first case involving death duties to reach this COURT, *Mager* v. *Grima*, *8 How. 490*, the tax involved was one imposed by the STATE OF LOUISIANA, in respect of the succession of a non-resident alien, arising out of property in that STATE left by a decedent. The decision sustains the tax as an incident of the power to regulate. Speaking for the COURT, Mr. CHIEF JUSTICE TANEY said:—

> "Now the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and terms upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it." *8 How. 480, 493.*

The foregoing was quoted in *Magoun* v. *Illinois Trust and Savings Bank*, *170 U. S. 283, 289-290*, in which it was declared, concerning the inheritance tax imposed by the STATE OF ILLINOIS, that—

> "The tax is . . . a condition of inheritance, . . ." *170 U. S. 283, 300.*

And in affirming the decision of the SUPREME COURT OF ILLINOIS in *In re Estate of Speed*, *216 Ill. 23, 27*, this COURT, by Mr. JUSTICE MCKENNA, said:—

> "It must be kept in mind that the controversies in this case depend upon the power of the State over inheritances and the conditions she may put upon them in the exercise of that power." *Board of Education* v. *Illinois*, *203 U. S. 553, 562.*

In *Campbell* v. *California*, *200 U. S. 87*, a decidedly unusual basis of classification, made the basis of exactions of this character, was sustained on the ground that

STATE power in the field of descent and distribution remains broad enough to warrant the discriminations of the CALIFORNIA statute. The decision says:—

> "But unless the effect of the FOURTEENTH AMENDMENT was inexorably to limit the STATES in enacting inheritance laws to the rule of blood relationship, such a regulation plainly involved the exercise of legislative discretion and judgment, with which the FOURTEENTH AMENDMENT did not interfere. Such a regulation cannot in reason be said to be an exercise of merely arbitrary power." *200 U. S. 87, 95.*

Such an exaction, under the authority of the STATE of the decedent's domicile, or of that in which property of the decedent is actually found at his death (*Blackstone* v. *Miller, 188 U. S. 189, 204-5*), may be sustained as a regulation when in default of this principle and as a mere tax it would be invalid. See:—

Mager v. *Grima, 8 How. 490, 493-4;*
Carpenter v. *Pennsylvania, 17 How. 456;*
Frederickson v. *Louisiana, 23 How. 445, 447;*
Magoun v. *Illinois Trust and Savings Bank, 170 U. S. 283, 288-290;*
Knowlton v. *Moore, 178 U. S. 41, 57;*
Plummer v. *Coler, 178 U. S. 115, 125-6, 133-5, 137, 138;*
Orr v. *Gilman, 183 U. S. 278, 287;*
Billings v. *Illinois, 188 U. S. 97, 104;*
Snyder v. *Bettman, 190 U. S. 249 (also, the dissenting opinion, pp. 256-7);*
South Carolina v. *United States, 199 U. S. 437, 458;*
Board of Education v. *Illinois, 203 U. S. 553, 562;*
Chanler v. *Kelsey, 205 U. S. 466, 478 (also the dissenting opinion, pp. 479-480, 482);*

Keeney v. *New York*, *222 U. S. 525, 533-4;*
Bullen v. *Wisconsin*, *240 U. S. 625, 631;*
Petersen v. *Iowa*, *245 U. S. 170, 175;*
Maxwell v. *Bugbee*, *250 U. S. 525.*

Dos Passos, in *The Law of Collateral and Direct Inheritance, Legacy and Succession Taxes, 2d Ed., p. 31*, says:

> "The right to impose these taxes is based upon the broad, constitutional power of the State, as sovereign, to modify, amend, extend, or wholly to repeal the laws governing the transmission of property by will and intestate laws."

So-called inheritance taxes of the States have, in many instances, been sustained upon grounds which in terms remove them from the category of taxes and fix their status, exclusively, as that of regulations of descent and distribution. Thus, in Missouri—

> ". . . we are firmly convinced that the law is not referable to the taxing power at all, but is referable to the power of the State to say what becomes of the property of a person, when death forecloses his right to control it." *State* v. *Guinotte*, *275 Mo. 298, 315.*

That this view avoids limitations which might be fatal if the exertion of power must rest upon the authority to tax was noted in the Missouri case.

> "On the theory that the law is not the exercise of the taxing power, but of another and different sovereign power, the divers and sundry Constitutional provisions as to taxation disappear from the case. This for the reason that these Constitutional provisions are but limitations upon the exercise of the taxing power, and none other." *275 Mo. 298, 315.*

Use of the word "TAX" in the statute was considered by the SUPREME COURT OF MISSOURI as in no degree impairing the conclusions illustrated by the foregoing extracts (*275 Mo. 298, 309, 315*). The same freedom from inherent restrictions of the taxing power has been noted in NEW YORK.

> "Passing . . . to . . . the inheritance tax, we find the power almost unlimited. The State having the power to abolish testamentary dispositions and the right to pass property by distribution we would naturally conclude that it could also determine the nature or kind of property that should pass, or could place a limitation or condition upon the transfer by death of any or all property. (See what Mr. Justice Holmes said in *Chanler* v. *Kelsey, 205 U. S. at page 479*)." *Matter of Watson, 226 N. Y. 384, 395.*

In VIRGINIA it is said that the power to impose death duties is unlimited (*Posey* v. *Commonwealth, 123 Va. 551, 553*), this freedom from restriction resulting from considering these exactions as resting upon the power to regulate.

> "Possessing this sweeping power over the whole subject, it is difficult to see upon what ground its right to appropriate a modicum of the estate, call it a tax or what you will, as the condition upon which those who take the estate shall be permitted to enjoy it, can be successfully questioned." *Eyre* v. *Jacob, 14 Gratt (Va.), 422, 430-1.*

The CONNECTICUT statute imposing death duties "affects the law of distribution" and the exactions are not considered taxes "in any true sense."

> "Those levies made by the State, which we familiarly call succession or inheritance taxes, have little

in common with taxes as ordinarily understood. In fact, they are not taxes in any true sense." *Warner* v. *Corbin, 91 Conn. 532, 536.*

The view taken in ILLINOIS is indicated by the following:

"The Legislature, having the undoubted power to regulate the subject of the devolution of property, may, by enacting a law for that purpose, provide that a certain portion of a decedent's property shall vest in the State. This, in effect, has been accomplished by what is known as our Inheritance Tax law." *Buck* v. *Rayner, 263 Ill. 222, 230.*

A similar basis for death duties is found in NORTH DAKOTA, where it is held that:—

"The so-called inheritance tax, indeed, is strictly speaking, not a tax at all. It is, rather, a permission on the part of the State that the heirs and legatees may take the bequests which are made to them less certain sums which are retained by it. In other words, it is a declaration that the State, instead of claiming all of the estate of a decedent, will only retain a certain portion thereof, and will allow the legatees to receive the remainder and according to the wishes of the testator, but less certain sums which it, itself, reserves." *Strauss* v. *State, 36 No. Dak. 594, 601.*

The SUPREME COURT OF WISCONSIN adheres to the same doctrine.

"Our inheritance tax was enacted pursuant to the power of the Legislature to reasonably regulate transfers of property and business transactions as stated in the *Nunnemacher case* (*129 Wis. 190*)." *In re Week's Estate, 172 N. W. 732, 733.*

And many other STATE courts have justified death duties upon the same basis. For example:—

"It is a retention by the State of a part of a deceased person's property which the State may take to meet its necessities, and which in certain cases it may take *in toto*, as in cases of escheated property." *State* v. *Alston, 94 Tenn. 674, 681; repeated, English* v. *Crenshaw, 120 Tenn. 531, 536.*

". . . the power to determine the devolution of estates includes the power to exact just and proportional contributions as they pass." *In re Hickok's Estate, 78 Vt. 259, 264-5.*

"If the Legislature may destroy this right, may it not regulate it? May it not impose conditions upon its exercise? And the condition it has imposed in this case is a tax." *Pullen* v. *Commissioners, 66 N. C. 361, 364.*

"Now the five per cent tax, is one of the conditions of administration, and to deny the right of the State to impose it, is to deny the right of the State to regulate the administration of decedent's goods. . . . The Federal government has not prohibited the States from prescribing rules of inheritance and succession to estates of decedents. . . ." *Strode* v. *Commonwealth, 52 Pa. St. 181, 189.*

See also:—

Corbin v. *Baldwin, 92 Conn. 99, 103;*
State v. *Dunlap, 28 Idaho 784, 799;*
Kochersperger v. *Drake, 167 Ill. 122, 125-6;*
Ryers v. *Chicago Title & Trust Co., 187 Ill. 42, 53;*
In re Estate of Speed, 216 Ill. 23, 27; affirmed, 203 U. S. 553;

In re Estate of Graves, 242 Ill. 212, 216;
People v. *Griffith*, 245 Ill. 532, 536;
National Safe Deposit Co. v. *Stead*, 250 Ill. 584, 597; *affirmed*, 232 U. S. 58;
Northern Trust Co. v. *Buck & Raynes*, 263 Ill. 222, 229;
Arnaud's Heirs v. *His Executor*, 3 La. Ann. 336;
Succession of Kohn, 115 La. Ann. 71, 75;
Succession of Levy, 115 La. Ann. 377, 384;
Succession of Westerfeldt, 122 La. Ann. 836, 847;
Fisher v. *State*, 106 Md. 104, 119, 120;
Washington Hospital v. *Mealey*, 121 Md. 274, 280;
Minot v. *Winthrop*, 162 Mass. 113, 118, 122, 124;
Emmons v. *Shaw*, 171 Mass. 410, 413;
Crocker v. *Shaw*, 174 Mass. 266, 267;
Frothingham v. *Shaw*, 175 Mass. 59, 61;
Attorney General v. *Stone*, 209 Mass. 186, 190;
Attorney General v. *Clark*, 222 Mass. 291, 294;
Union Trust Co. v. *Probate Judge*, 125 Mich. 487, 494;
State v. *Probate Court*, 112 Minn. 279, 287;
State v. *Henderson*, 160 Mo. 190, 216;
Maguire v. *University*, 271 Mo. 359, 368;
In re Cupple's Estate, 272 Mo. 465, 473;
Gelsthorpe v. *Furnell*, 20 Mont. 299, 303-4;
In re Touhy's Estate, 35 Mont. 431, 435-6;
State v. *District Court*, 41 Mont. 357, 364;
Howell v. *Edwards*, 88 N. J. L. 134, 136;
Matter of Hamilton, 148 N. Y. 310, 313;
Matter of Sherman, 153 N. Y. 1, 4;
Matter of Dows, 167 N. Y. 227, 231-2;
Matter of Delano, 176 N. Y. 486, 491-2;
Matter of Lansing, 182 N. Y. 238, 248;

Matter of White, *208 N. Y. 64, 67;*
Matter of Zborowski, *213 N. Y. 109, 111-2;*
Matter of Josephine Penfold, *216 N. Y. 163, 166-7;*
Alvaney v. *Powell*, *55 N. C. 51, 60;*
In re Morris' Estate, *138 N. C. 259, 262;*
Finnen's Estate, *196 Pa. St. 72, 75;*
Jewell's Estate, *235 Pa. St. 119, 122;*
Jackson v. *Myers*, *257 Pa. St. 104, 108;*
Sherman v. *State*, *25 So. Dak. 369;*
Knox v. *Emerson*, *123 Tenn. 409, 414;*
Dixon v. *Ricketts*, *26 Utah 215, 220;*
Schoolfield's Executor v. *City of Lynchburg*, *78 Va. 366, 370;*
In re Joyslin's Estate, *76 Vt. 88, 93;*
State v. *Clark*, *30 Wash. 439, 445;*
Nunnemacher v. *State*, *129 Wis. 190, 195-6, 204.*

Other STATE cases on this point are cited elsewhere in this brief; see, *infra*, *215-7*.

Prior to the decision of either *State* v. *Guinotte*, *supra*, or *Matter of Watson*, *supra*, this COURT had noted the peculiar advantages, in this field, of the power to regulate the transmission of decedents' estates as *compared with the mere power to tax* the exercise of rights incident to such transmission.

> "Courts which maintain this view have therefore treated death duties as disenthralled from limitations which would otherwise apply, if the privilege of regulation did not exist." *Knowlton* v. *Moore*, *178 U. S. 41, 57.*

Thus, for example, the STATES, exercising their plenary and exclusive power to regulate, are able to prohibit

devises to the UNITED STATES (*United States* v. *Fox, 91 U. S. 315*) or, in more moderate exercise of the same power, to divert to their own treasuries, portions of legacies to the FEDERAL government (*United States* v. *Perkins, 163 U. S. 625*) or to demand a share out of a legacy of UNITED STATES bonds (*Plummer* v. *Coler, 178 U. S. 115*). This is not the power to tax (*Head Money Cases, 112 U. S. 580*).

Fourth.—3. Sovereign power to regulate any subject-matter may have (a) positive expression in rules, requirements, or requisitions established by legislative authority or (b) negative expression in the absence of such rules, requirements or requisitions, the absence of any particular class of rules, requirements or requisitions indicating the legislative will that, in that aspect, the subject-matter shall be free from regulative restraint and requisition. The sovereign power of a State to regulate descent and distribution will always be found to have been expressed, in the matter of the requisition of death duties of the kind which are essentially a manifestation of such power, either (a) in the requisiton of such death duties or (b) in the absence of any such requisition, thus indicating the will of the State that there shall be no such requisition.

THE POWER TO REGULATE seems to be that to prescribe the rules, *and all the rules*, by which the subject-matter as to which such power exists is to be governed.

> ". . . the word 'to regulate' implies in its nature, full power over the thing to be regulated; it excludes, necessarily the action of all others that would perform the same operation on the same thing." *Gibbons* v. *Ogden, 9 Wheat. 1, 209.*

And—

"That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated." *9 Wheat. 1, 209.*

"The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions." *Gloucester Ferry Co.* v. *Pennsylvania, 114 U. S. 196, 203-4.*

See, also:

Hammer v. *Dagenhart, 247 U. S. 251, 269.*

If it be true, therefore, as argued above, that death duties *may* be established in such manner as to manifest or to affect the power to regulate descent and distribution, it would be beside the question to inquire whether any particular STATE has or has not exercised its regulative authority by prescribing a tax of that character. Given the power to regulate by means of such taxes, the non-exercise of that power is, upon authority, precisely as significant as its exercise. The power of the STATE is *to prescribe the whole system of regulation;* therefore to establish and maintain all the boundaries and limitations upon absolute freedom to dispose of the entire property or estate that are to exist in any form. Where the STATE omits to restrain, there can be no restraint: what it does not choose to require cannot be required by any other authority.

> "A concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action." *Passenger Cases, 7 How. 283, 399.*

Fourth.—4. The taxing power of the United States cannot Constitutionally be so exercised as to amount to an usurpation of any sovereign power belonging to the States. If the United States have attempted to impose death duties in a form in which such requisitions are essentially a manifestation of the sovereign power to regulate descent and distribution, this is an attempted usurpation of a sovereign power belonging to the States.

THE FEDERAL POWER to regulate interstate and foreign commerce is the precise analogue, in the aspect of its exclusive possession by the UNITED STATES, of the STATE power to regulate descent and distribution, in the aspect of the exclusive possession of the latter by the STATES (*Knowlton v. Moore, 178 U. S. 41, 59*). And any STATE tax upon interstate or foreign commerce is, according to repeated decisions, an invasion of the FEDERAL power to regulate conferred by the "commerce clause."

> "And all restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States." *Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 214.*

Concededly lawful powers of the STATES are restrained when attempt is made to exercise them in a way which would burden interstate commerce or impair in any degree its immunity from STATE control. It was so declared in *Pullman Company v. Kansas, 216 U. S. 56*, reversing *75 Kans. 664*, and denying effect to a statute of KANSAS

which purported to attempt only the exclusion of foreign corporations, not submitting to the terms imposed by the STATE, from intrastate commerce which was wholly within STATE control. The present CHIEF JUSTICE, for the majority of the COURT, said:

> "A State may not exert its concededly lawful powers in such a manner as to impose a direct burden on interstate commerce. This is so elementary as to require no reference to the multitude of authorities by which it is maintained." *216 U. S. 56, 65.*

It is immaterial whether the burden upon interstate commerce appears upon the face of the Act of State legislation, or whether it was intended. If it results in any way from the operation of such an attempted exertion of STATE power, the legislative action is inoperative and void.

> "According to the well-settled rules of statutory construction, the validity of a statute, whatever its language, must be determined by its effect or operation, as manifested by the natural and reasonable meaning of the words employed. *Henderson v. Mayor of New York, 92 U. S. 259, 268.* If a statute by its necessary operation, really and substantially burdens the interstate business of a foreign corporation seeking to do business in a State, or imposes a tax on its property outside of such State, then it is unconstitutional and void, although the State legislature may not have intended to enact an invalid statute." *Ludwig v. Western Union Telegraph Co., 216 U. S. 146, 162.*

An express disclaimer by the STATE of a purpose to burden interstate commerce does not aid its enactment if its actual effect is to create such a burden. *Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 27.*

See, also:

> *Brown* v. *Maryland, 12 Wheat. 419;*
> *Passenger Cases, 7 How. 283;*
> *Almy* v. *California, 24 How. 169;*
> *Ward v. Maryland, 12 Wall. 418;*
> *Welton* v. *Missouri, 91 U. S. 275;*
> *Railroad Company* v. *Husen, 95 U. S. 465;*
> *Tiernan* v. *Rinker, 102 U. S. 123;*
> *Webber* v. *Virginia, 103 U. S. 344;*
> *Telegraph Co.* v. *Texas, 105 U. S. 460, 466;*
> *Robbins* v. *Shelby Taxing District, 120 U. S. 489, 494;*
> *Philadelphia & Southern Steamship Co.* v. *Pennsylvania, 122 U. S. 326, 336;*
> *California* v. *Central Pacific R. R. Co., 127 U. S. 1;*
> *Postal Telegraph Cable Co.* v. *Richmond, 249 U. S. 252, 261.*

It will not be doubted that the STATES are as supreme in the regulation of descent and distribution as the FEDERAL government in the regulation of interstate and foreign commerce. Each in its respective field is wholly independent of the other.

> "In our complex system of government it is oftentimes difficult to fix the true boundary between the two systems, State and Federal . . . Their powers are so intimately blended and connected that it is impossible to define or fix the limit of the one without at the same time that of the other in respect to any one of the great departments of government. When the limit is ascertained and fixed, all perplexity and confusion disappear. Each is sovereign and independent in its sphere of action, and, exempt from the interference or control of the

other, either in the means employed or functions exercised, . . . *Bank of Commerce* v. *City of New York*, *2 Black. 620, 634.*

"We have in this Republic a dual system of government, National and State, each operating within the same territory, and upon the same persons, and yet working without collision because their functions are different. There are certain matters over which the National government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National government is powerless. . . ."

"In other words, the two governments, National and State, are each to exercise their power so as not to interfere with the free and full exercise by the other of its powers." *South Carolina* v. *United States*, *199 U. S. 437, 448, 452.*

"The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters entrusted to the Nation by the Federal constitution.

"In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National government are reserved. *Lane County* v. *Oregon*, *7 Wall. 71, 76.* The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government." *Hammer* v. *Dagenhart*, *247 U. S. 251, 275.*

"That government whose powers, executive, legislative or judicial, . . . are subject to the con-

trol of another distinct government, cannot be sovereign or supreme, but subordinate and inferior to the other. This is so palpable a truth that argument would be superfluous. Its functions and means essential to the administration of the government, and the employment of them, are liable to constant interruption and possible annihilation . . . But of what avail is the function or the means if another government may tax it at discretion? It is apparent that the power, function, or means, however important and vital, are at the mercy of that government." *Bank of Commerce* v. *City of New York, 2 Black. 620, 633-4.*

Thus it appears that the exercise of the sovereign power to tax, concurrently and fully held by both the FEDERAL and STATE governments, is restrained by the implications of the CONSTITUTION when resort to it by either of them threatens the integrity of an exclusive power belonging to the other. *Collector* v. *Day, 11 Wall. 113; and see, infra, 80-97.*

Fourth.—5. The death duty attempted to be imposed by the Act of September 8, 1916, is of such form that, if effective, its enactment would be an usurpation of the sovereign power to regulate descent and distribution.

UP TO THIS POINT in the discussion, there has been no attempt to identify the particular description of death duties which are considered in their essence to amount to regulations of descent and distribution. The argument has been advanced to the point at which it is thought to have been demonstrated that there are certain forms of death duties which, under the dual form of government that exists in the UNITED STATES, can be exacted by the STATES only, because they alone possess the sovereign power to regulate descent and distribution; because in

this field of sovereignty they are supreme, and because their supremacy and sovereignty would exist no longer if the right of another sovereign to regulate in the same field could be admitted. And the necessity of this conclusion is the more apparent when it is recognized, as it must be, that wherever the UNITED STATES possess any power at all, their authority is paramount. Their sovereignty is not shared; where it exists no other authority may enter; in any field, it is either true that the UNITED STATES possess complete authority (save as expressly restricted by the FEDERAL CONSTITUTION), or they are destitute of power. This is even true of taxation. If the lawfully exercised power of the FEDERAL government and the lawfully exercised power of a STATE should lay claim upon the same property, in the effort to enforce a tax, the conflict would be resolved by upholding the supremacy of the UNITED STATES (*Pollock* v. *Farmers' Loan & Trust Co., 157 U. S. 429, 561*).

The practical inquiry that remains, then, is to determine whether the particular death duties provided for by the Act of September 8, 1916, are obnoxious to this principle and, therefore, UNCONSTITUTIONAL AND VOID. Are these duties essentially regulations of descent and distribution? Undoubtedly, like the legacy tax sustained in *Knowlton* v. *Moore, 178 U. S. 41*, they diminish the inheritance, but is not their burden plainly upon the power of the STATE to regulate (*178 U. S. 41, 60*)? Extremely suggestive is one of the questions asked in the case cited. The majority of the COURT inquired:—

> "Thus imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the State cannot be taxed, because it had been at some prior time the subject of exclusive regulation by Congress?" *178 U. S. 41, 59.*

Thus, although the power to tax the act of *importation* is exclusively in CONGRESS and whether the FEDERAL legislature has, in a particular instance, (1) imposed a tax or (2), by refraining from such an imposition, indicated its will that importation shall be free and unconditional, no other authority can impose any restraint whatever, either by direct or by indirect taxation, there comes a time when *importation* is complete, when the imported goods have become a part of the general stock of goods within the STATE of destination, and when that time arrives, such goods are no longer protected against STATE taxation. In other words, when the process of importation is accomplished; when its object, the addition of goods of foreign origin to the property complex within a STATE, has been achieved; when these imported goods have become mingled with the other property subject to STATE authority; then, and not until then, they may be taxed by the STATE, indifferently with other property to which the STATE power of taxation applies.

Just so, the exclusive power of any STATE over descent and distribution, exists to accomplish a definite result, the effective protection of the property rights of citizens and the transmission of the property of decedents to those whom the STATE permits to succeed thereto. The processes of administration, provided for in the exercise of STATE *power*, have been developed to secure these results.

> "But, until the period for distribution arrives, the law of the decedent's domicile attaches to the property, and all other jurisdictions refer to the place of the domicile as that where the distribution should be made . . . The rights of the donee are subordinate to the conditions, formalities and administrative control, prescribed by the State in the interests of its public order, and are only irrevocably established upon its abdication of this control at

the period of distribution." *Carpenter* v. *Pennsylvania, 17 How. 456; quoted and reaffirmed, Orr* v. *Gilman, 183 U. S. 278, 285.*

The purposes of this process of administration are, then, (1) to protect the rights of creditors of the decedent, (2) to enforce the rights of the STATE to any price or toll which it chooses to exact as a condition or incident of its regulation and (3) to translate the ownership of the decedent of the whole estate into the separate ownerships of his successors, designated in accordance with the STATE's will as expressed in the laws governing testate and intestate successions, delimiting (as a part of the process) the separate pieces or parcels of property and the separate interests therein which are to pass to the respective successors. If this process is, as it seems to be, a process exclusively within the scope of a sovereign power reserved to the STATES, neither by any express or implied delegation conferred upon CONGRESS or in any degree impaired or subjected to the control of any other sovereign, it appears to be impossible that it can be invaded or burdened by any CONSTITUTIONAL exercise of the FEDERAL power to tax. It would seem to be as entitled to freedom from FEDERAL taxation as the FEDERAL power to regulate interstate and foreign commerce, including the right to exclude or admit or tax the admission of imports, is entitled to freedom from STATE taxation. Apparently each STATE is entitled, without interference under FEDERAL authority, (1) to take control of all the property within its borders when the possession thereof becomes vacant by reason of the death of the owner, (2) to hold (through its probate courts and their officers) and administer the assets of decedents coming within its control and (3) to declare and determine, through its laws and the agencies suggested, precisely what property shall pass to successors and to what successors and in what proportions and

with what interests. When this process is complete, and not until then, there will always have emerged therefrom definite devises, inheritances, legacies or distributive shares. Sustaining the right of the STATE OF PENNSYLVANIA to take its collateral inheritance tax in respect of a legacy of UNITED STATES bonds, the SUPREME COURT of that STATE, said:—

> "The law takes every decedent's estate into custody, and administers it for the benefit of creditors, legatees, devisees and heirs, and delivers the residue that remains, after discharging all obligations; to the distributees entitled to receive it. . . . And it is not until this work of administration is performed, that the right of succession attaches." *Strode* v. *Commonwealth, 52 Pa. St. 181, 189.*

To say that the PROCESS must be free from FEDERAL interference, in the form of taxation or otherwise, is merely to say that the STATE power in the premises is a sovereign power, exclusively possessed by the STATES and not subject to limitation by another sovereign. To assert this freedom as to the PROCESS of administration is radically different from insistence upon similar freedom from taxation as to the RESULTS OF THE PROCESS. Complete freedom for the process is wholly consistent with the view that, when the result has been achieved, when the definite devise, inheritance, legacy or distributive share has emerged, the right to receive such definite property or interest in property is a right or privilege existing under STATE law, the exercise of which may CONSTITUTIONALLY be subjected to a FEDERAL excise tax. The privilege exists, therefore, its exercise may be taxed. *Nicol* v. *Ames, 173 U. S. 509, 521.* "The exercise of such rights, as regulated" (*Knowlton* v. *Moore, 178 U. S. 41, 59*), may then be made the subject of a CONSTITUTIONAL FEDERAL excise. The distinction between a tax on such

an *exercise of a right* and a tax or burden on the right itself, which would be a tax on the property unless it could be sustained as a regulation, was clearly stated in *In re McKennan's Estate, 25 So. Dak. 369*, a case involving the inheritance tax of SOUTH DAKOTA.

> ". . . it is not a tax upon the right to inherit or to succeed, nor upon the right to transmit, but a tax upon the *exercise of such* right—upon the transmission of property. To illustrate: Every person owning property has the inherent right to sell such property, and every other person has the inherent right to purchase same. These rights are subject to regulation, but they could not be taxed unless considered as property, and, if property, must be taxed as such. Yet the Federal government has, in quite recent years, by its Act to raise revenue for the Spanish War, imposed a tax, not on the land, not on the right to sell or purchase land, but upon the transfer of land, upon the exercise of the right to sell and buy." *25 So. Dak. 369, 377.*

Now there is no suggestion in this brief, and after the decisions in *Scholey* v. *Rew, supra,* such a suggestion might well invoke ridicule, that CONGRESS is without power to tax the transmission of legacies and distributive shares *when out of the administrative process prescribed by the* STATE *there has finally emerged an ascertained or ascertainable right to receive property or some valuable interest therein by testate or intestate succession.* And there is no decision holding that any FEDERAL inheritance tax ever became a charge against any interest or was ever intended to attach as a liability or tax until the emergence of such a right. On the contrary, all the decisions have been to the effect that the tax liability did not accrue until the one beneficially interested became entitled to immediate possession or enjoyment. See:—

Clapp v. *Mason*, 94 *U. S.* 589;
Mason v. *Sargeant*, 104 *U. S.* 689;
Sturges v. *United States*, 117 *U. S.* 363;
United States v. *Jones*, 236 *U. S.* 106;
McCoach v. *Pratt*, 236 *U. S.* 562;
Uterhart v. *United States*, 240 *U. S.* 598;
Sage v. *United States*, 250 *U. S.* 33.

Obviously, the death duties discussed in the foregoing cases were postponed until the processes of regulation, provided for in the exercise of the sovereign power of the STATES, had performed their functions. In that respect, they parallel the STATE taxes which may be imposed upon imported property after the completion of the process of importation has resulted in a mingling with the general stock of goods in the STATE. Such commingling, in the case of imports, marks the end of the process of importation, just as the definition or emergence, out of the mass of assets and liabilities of an estate, of the beneficial interest of each respective successor to the decedent, witnesses the end and consummation of the process of regulation.

The exaction complained of in this proceeding is not postponed to the completion of the administration. It is to be computed in respect of the whole balance of assets over liabilities (*Sections 201-3*); it is to be paid by the personal representatives (*Section 207*), out of property passing to them as such (*Section 208*); property not passing to the personal representatives is tax-free, unless the property so passing is insufficient (*Section 208*), and payment before distribution is expressly provided for (*Section 208*).

". . . it being the purpose and intent of this title that so far as practicable and unless otherwise

directed by the will of the decedent the tax shall be paid out of the estate before its distribution." *Section 208.*

Thus, the instant exaction, like the ENGLISH estate duty, is independent of the destination of the property, attaches to all the property in which the decedent had a power of disposition by reason of ownership, directly diminishes the estate subject to administration under STATE control, and in no sense whatever rests upon any right to receive by will or by intestate succession or the exercise of any such right or privilege. *And this diminution of the estate subject to administration takes place while administration is in progress; before it is complete; directly reducing, not the ascertained portion of any beneficiary, but the total sum which the* STATE *is entitled to apportion in accordance with its legislative will.*

It would seem, therefore, that by the Act of September 8, 1916, the CONGRESS attempted to thrust the UNITED STATES into the administration of every estate, with power to observe and check the process and eventually, whenever the facts necessary to support an assessment should be ascertained, to withdraw from the assets in the hands of the personal representatives, the percentage of the net assets (less the exemption) fixed by Section 201. Considering the exaction in this light, it was natural that CONGRESS should require payment at a definite time determined by the date of death (*Section 204*). If this Act is valid, the amount of *the tax exacted by the United States becomes the final factor in determining the amount to be acted upon by the order of distribution*, exactly reversing the situation disclosed by a study of the FEDERAL death duties previously discussed in this COURT (*Scholey* v. *Rew, 23 Wall. 331; Knowlton* v. *Moore, 178 U. S. 41*),

for in all such cases *the amounts fixed in the order of distribution controlled the amount of the tax.*

If it is valid, CONGRESS has power to fix a tax of one hundred per cent on every estate, thus completely depriving the STATE power of administration of its subject-matter and even ousting the STATE power to take a part of the estate as toll conditioning rights under its laws of descent and distribution.

The nature of this process of administration, in which CONGRESS has thus attempted to intermeddle, is set forth in ***Tilt* v. *Kelsey, supra.***

> "When the owners of property die. . . . For a suitable time it is essential that the property should remain under the control of the State, until all just charges against it can be discovered and paid, and those entitled to it as new owners can be ascertained. . . . It is the duty of the sovereign to provide a tribunal, under whose direction the just demands against the estate may be determined and paid, the succession decreed, and the estate devolved to those who are found to be entitled to it . . . But somewhere the power must exist to decide finally as against the World, all questions which arise in the settlement of the succession. . . .
>
> "In respect to the settlement of the successions to property on death the States of the Union are sovereign . . ." *207 U. S. 43, 55-6.*

See, also; *infra, 72-8.*

Plainly a tax in respect of the right of succession, attaching after or upon "the settlement of the succession," by means of a process prescribed by STATE law and substantially in accordance with the foregoing outline, is *a*

very different thing from a tax exacted while that process of settlement is in progress; the latter being one which must materially affect its result, the former having no effect whatever upon such settlement and not at all affecting the succession as decreed. It is submitted that the former is CONSTITUTIONAL and proper while the latter is **UNCONSTITUTIONAL AND VOID.**

Recognition of the principle that there can be no FEDERAL right to interfere with this process of administration while the STATE power to regulate is functioning is found in the inheritance tax case of *Cahen* v. *Brewster*, *203 U. S. 543*, where such FEDERAL interference is characterized as "usurpation." In that case, referring to former discussions of the nature of STATE death duties, and sustaining such an exaction by the STATE OF LOUISIANA, it was said:—

> "In other words, we defined the nature of the tax; we did not prescribe the time of its imposition. To have done the latter would have been to prescribe a rule of succession of estates, and usurp a power we did not and do not possess." *203 U. S. 543, 551.*

PLAINTIFFS-IN-ERROR, considering the foregoing, are constrained to the belief that the enactment of Sections 200 *et seq.* of the Act of September 8, 1916, presents for the determination of this COURT one of those tremendous and far-reaching questions of CONSTITUTIONAL law, involving the restraint of an attempted exercise of the FEDERAL power of taxation which has taken such form that its enforcement threatens the perpetuity of our dual form of government, for the reason that it would undermine and eventually destroy the sovereignty of the STATES in a field reserved to their exclusive authority.

Happily this great question can be submitted to this tribunal which has ever held evenly the balance between FEDERAL and STATE powers.

> ". . . we think it will be found that this COURT so far as its functions required has always held with a steady and an even hand, the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or any of its parts." *Slaughter House Cases, 16 Wall. 36, 82.*

FIFTH.

If the exaction complained of is a tax in respect of the transfer of the whole estate it must relate to the transfer to the personal representatives and therefore be an unconstitutional attempt to tax an essential step lawfully required by the States in the exercise of their exclusive power over descent and distribution.

THE FOREGOING PROPOSITION is separately stated and examined, although under rigid analysis it will probably be found to be subordinate to the discussion already presented (*supra, 35-66*), in which we have endeavored to show that the instant exaction is an interference with or usurpation of the STATE power to regulate descent and distribution.

It will doubtless be conceded that the very general recognition of a distinction between (1) those death duties, which are properly classed as excise taxes, and (2) taxes on property, rests upon the relation of the former to the actual occurrence of *some* transfer of ownership in consequence of death.

United States v. *Perkins*, *163 U. S. 625, 628;*
Magoun v. *Illinois Trust & Savings Bank*, *170 U. S. 283, 288;*
Knowlton v. *Moore*, *178 U. S. 41, 46, 56, 57, 58, 83;*
Orr v. *Gilman*, *183 U. S. 278, 289;*
Eidman v. *Martinez*, *184 U. S. 578, 589;*
Moore v. *Ruckgaber*, *184 U. S. 593, 596;*
Blackstone v. *Miller*, *188 U. S. 189, 204-6;*
Snyder v. *Bettman*, *190 U. S. 249, 250;*
Vanderbilt v. *Eidman*, *196 U. S. 480, 497;*
Cahen v. *Brewster*, *203 U. S. 543, 550-1;*
Tilt v. *Kelsey*, *207 U. S. 43;*
Keeney v. *New York*, *222 U. S. 525, 537;*
Maxwell v. *Bugbee*, *250 U. S. 525.*

Assuming for the purposes of argument, and reserving for the present the considerations that lead to the contrary conclusion, that the exaction is a tax but not a direct tax, it becomes pertinent to inquire whether it could be justified as a CONSTITUTIONAL tax in respect of any transfer of all or any part of the estate of the decedent represented by PLAINTIFFS-IN-ERROR. To this end, it will be desirable to consider what transfers were actually originated by the death of, J. HARSEN PURDY, the decedent here represented.

This death gave rise to the universal succession of PLAINTIFFS-IN-ERROR, under the laws of NEW YORK and with the sanction of the proper SURROGATE'S COURT, as executors. Their title to the property which came into their possession, as executors, is to be treated, in all respects, as originating *at the instant of their decedent's death.*

"The title of an executor in the personal property of his testator, being derived from the will, doubtless vests in him from the moment of the testator's death. *Dixon* v. *Ramsey*, *3 Cranch. 319, 323;*

Hill v. *Tucker*, *13 How. 458, 466.*" *Wall* v. *Bissell*, *125 U. S. 382, 387.*

"When a deceased person has disposed of his personal estate by will, the title, possession, and control thereof, from the moment of his death, must be vested in some one, and in the absence of some wrongful interference by a stranger, it is in the person designated for that purpose by the deceased owner in the instrument by which he has made the disposition." *People* v. *Barker*, *150 N. Y. 52, 57.*

Unless this universal succession of the executors is to be regarded as a transfer of the whole estate by reason of this death there was never any transfer of the whole estate.

PLAINTIFFS-IN-ERROR never acquired a *beneficial interest* in the estate they represent. It is true that *beneficial title passed from the decedent at the moment of death* and vested, subject to the processes and demands of administration and the rights of creditors, in his successors in interest at the same moment. His three residuary legatees (*R. 3-4*), although definition of their rights could not occur until the settlement of the executors' accounts and the entry of an order of distribution, took, at the instant of their testator's death, vested rights in his residuary estate, whatever it might turn out to be. But these were separate transfers of separate portions of the estate; there was no single transfer of the whole estate; instead, there were several contemporaneous transfers of distinct portions of the estate. The *moment of death witnessed the breaking up of the beneficial ownership of the estate into separate portions and the separate transfer of each of the portions* thus determined, diminished by the toll or bonus (called "transfer tax") exacted by the State of New York, *to the particular beneficiary to whom*

it was destined (STATES other than NEW YORK exacted death duties —*R 4*—but these were in respect of the universal succession. *Blackstone* v. *Miller, 188 U. S. 189, 204-6; Maxwell* v. *Bugbee, 250 U. S. 525, 535-6*; hence *they diminished the estate, but did not directly diminish the legacies*).

> "So far the transfers take place necessarily at the moment of death, for the will on the one hand and the intestate laws on the other, operate and speak from that date, . . ." *Matter of Seaman, 147 N. Y. 69, 76.*
>
> "Upon the intestate's death, his estate passed, *eo instanti*, to the persons who, by virtue of the intestate law, were entitled thereto." *Matter of Ramsdell, 190 N. Y. 492, 495.*

It results, as there was no other transfer of the whole estate, that *if any transfer of the whole estate is to be considered as having been taxed, it must be the transfer of the universal succession of the executors.* It is precisely as though the present Act, in terms, imposed the tax "*upon the transfer to the executor of the net estate.*" This must be so, for there was never any other transfer which could reasonably be regarded as a transfer of the entire estate.

A transfer is essentially an entire transaction. The transfer of a beneficial interest in a decedent's estate involves the *concurrence of two wills*, that is, there must be in agreement (1) the will of the testate or intestate decedent to transmit certain of his property to a certain beneficiary, by will or according to the laws regulating intestate succession, and (2), the will of the beneficiary thus indicated to accept (and not to refuse) the benefit. On the other hand the transfer of the universal succes-

sion to the personal representatives of the deceased, a transfer imperatively created by law and limited by the purposes of the law, is *required* by the social or organized or universal will of the STATE. But in all cases, to make up a transfer there must be a transferee as well as a transferrer. Title or right must be received as well as parted with. The power of CONGRESS to tax *the exercise of the right to receive* a beneficial interest thus transferred is fully established by the decisions in *Scholey* v. *Rew*, *supra*, and *Knowlton* v. *Moore*, *supra*, but such a right to tax is very different from a right to tax the transfer to the personal representatives and it is the latter right that is now under examination.

Obviously, a tax "upon the transfer" must be upon some actual transfer. No such tax can be established unless the fact of transfer can be established. The law cannot postulate a transfer that never took place in order to sustain a tax which requires an actual transfer as its fundamental basis. As there is here no transfer of the whole estate of J. HARSEN PURDY, except that to his personal representatives, it seems inevitably to follow that the right of the UNITED STATES to impose a tax in respect of the transfer of his whole estate, must rest upon their right, if they possess such a right, to tax the transfer of the universal succession of these personal representatives. Have the UNITED STATES the right to tax this transfer? The response to this question is to be found in the answer to the inquiry whether the FEDERAL government can impose a tax upon this transfer without limiting the sovereign and unlimited and illimitable power of the STATES to provide properly for the administration of decedents' estates.

It is true that the universal succession may be taxed by the STATE to which it owes its origin and consumma-

tion. Whether it can be subjected to taxation, also, by the UNITED STATES will probably be found to depend upon the relations between the FEDERAL and the STATE governments and upon the essential character of the universal succession and the purposes for which this "artificial continuance of the person of a deceased" is presumed.

"Universal succession is the artificial continuance of the person of a deceased by an executor, heir, or the like, so far as succession to rights and obligations is concerned. It is a fiction, the historical origin of which is familiar to scholars, and it is this fiction that gives whatever meaning it has to the saying *mobilia sequuntur personam*. But being a fiction it is not allowed to obscure the facts, when the facts become important. . . .

"To come closer to the point, no one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the *situs* accepts its rules of succession from the law of the domicile or that by the law of the domicile the chattel is part of a *universitas* and is taken into account again in the succession tax there.

"No doubt this power on the part of two States to tax on different and more or less inconsistent principles, leads to some hardship . . . But these inconsistencies infringe no rule of constitutional law . . .

"The fact that two States dealing each with its own law of succession, both of which the plaintiff in-error has to invoke for her rights, have taxed the right which they respectively confer, gives no cause for complaint on constitutional grounds. *Coe* v. *Errol, 116 U. S. 517, 524; Knowlton* v. *Moore, 178 U. S. 41, 53.* The universal succession is taxed in one State, the singular succession is taxed in another. The plaintiff has to make out her right under

both in order to get the money." *Blackstone* v. *Miller*, *188 U. S. 189, 204-7.*

New Jersey is one of the States which imposes death duties, in certain cases, in respect of the universal succession.

"In *Carr* v. *Edwards*, *84 N. J. L. 667*, it was held by the New Jersey Court of Errors and Appeals to be a tax upon the special right, the creation of the statute, of an executor or administrator of a non-resident decedent to succeed to property having its situs in New Jersey . . .

"That transfers of this nature are within the taxing power of the State, and that taxes may be assessed upon such rights owing their existence to local laws, and to them alone, is not disputed." *Maxwell* v. *Bugbee*, *250 U. S. 525, 535-6.*

It has already been noted (1) that the power to regulate descent and distribution, in the exercise of which this fiction of universal succession is an expedient of common recourse, is a sovereign power reserved to the States and (2) that the Federal government has no duties, functions or powers in this field (*supra, 36-40*).

"The powers exclusively given to the Federal government are limitations upon the State authorities. But, with the exception of these limitations, the States are supreme, and their sovereignty can be no more invaded by the action of the General government, than the action of the State governments can arrest or obstruct the course of National power." *Concurring opinion of Mr. Justice McLean*, *Worcester* v. *Georgia*, *6 Pet. 515, 570.*

The nature, then, of this universal succession that was the thing taxed, if the exaction now in issue is consid-

ered as a tax upon any transfer of the whole estate of which the decedent here represented was the owner at the time of his death, is that of *a transfer required by the* STATE OF NEW YORK *in the exercise of its sovereign power to control the descent and distribution of his estate.* It was not a transfer of any beneficial interest but PLAINTIFFS-IN-ERROR acquired title only as trustees and solely in order to carry out the purposes of the STATE as expressed in the laws of the STATE.

> "In the court of chancery, executors and administrators are considered as trustees, and that court exercises original jurisdiction over them, in favor of creditors, legatees and heirs, in reference to the proper execution of their trust. . . . And the existence of this jurisdiction has been acknowledged in this Court, and in several of the courts of chancery in the States. *Hagan* v. *Walker, 14 How. 29; Pharis* v. *Leachman, 20 Ala. 663; Spottswood* v. *Dandridge, 4 Munf. 289.*" *Kendall* v. *Creighton, 23 How. 90, 106.*

And PLAINTIFFS-IN-ERROR, for the purposes of their trusteeship, were *essential agents or officers of the court* of the STATE OF NEW YORK by which they were appointed or by which their designation in the will was confirmed and sanctioned (*R. 3*).

> ". . . the legal effect of granting letters testamentary or of administration, is to place the whole estate, real and personal, within the custody of the law, and leave it there until the administration has been completed; . . ." *Yonley* v. *Lavender, 21 Wall. 276, 276.*

> "It is therefore within the power of the sovereign to give to its courts the authority, while settling the succession of estates in their possession, through their officers, the executors or admin-

istrators, to determine finally, as against the world, all questions which arise therein." *Tilt* v. *Kelsey*, *207 U. S. 43, 56.*

See, also:

> *Dixon's Executors* v. *Ramsay's Executors, 3 Cranch. 319, 323-4;*
> *Vaughn* v. *Northup, 15 Pet. 1, 5-6;*
> *Board of Public Works* v. *Columbia College, 17 Wall. 521;*
> *Wall* v. *Bissell, 125 U. S. 382, 389, 390;*
> *Byers* v. *McAuley, 149 U. S. 608, 613, 615, 616;*
> *Baugh* v. *Weis, 138 Ind. 42, 45, 48;*
> *Stagg* v. *Green, 47 Mo. 500, 502;*
> *State* v. *Morrison, 244 Mo. 193, 204.*

Doubtless the courts of probate would have full power to designate such officers in the absence of direct statutory provision therefor—certainly it is difficult to imagine the performance of this function of State sovereignty without resort to officers empowered to act as administrators or executors.

> "Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties." *Ex Parte Peterson, 253 U. S. 300, 312.*

The transfer to the personal representatives is not in the interest, primarily, of those beneficially entitled; in a substantial sense it is adverse to them, for it frequently considerably postpones their enjoyment. In fact this intermediate transfer to fiduciaries, acting as agents of the State, is wholly in order to enable the State, through these agents, to perform its duty. It was so defined in *Tilt* v. *Kelsey, supra.*

"For a suitable time it is essential that the property should remain under the control of the State, until all just charges against it can be discovered and paid, and those entitled to it as new owners can be ascertained . . . It is the duty of the sovereign to provide a tribunal under whose direction the just demands against the estate may be determined and paid, the succession decreed, and the estate devolved to those who are found to be entitled to it." *207 U. S. 43, 55.*

Compare:

Griffith v. *Frazier, 8 Cranch. 9;*
Kane v. *Paul, 14 Pet. 33;*
Grignon v. *Astor, 2 How. 319, 338;*
Hagan v. *Walker, 14 How. 29, 35;*
Carpenter v. *Pennsylvania, 17 How. 456;*
Wilkins v. *Ellett, 9 Wall. 740;*
Yonley v. *Lavender, 21 Wall. 276;*
Kisley v. *McGlynn, 21 Wall. 503;*
Wilkins v. *Ellett, 108 U. S. 256;*
Borer v. *Chapman, 119 U. S. 587;*
Orr v. *Gilman, 183 U. S. 278, 285;*
Baker v. *Baker, Eccles & Co., 242 U. S. 394;*
Shoenberger's Executors v. *Lancaster Savings Institution, 28 Pa. St. 459, 466;*
Strode v. *Commonwealth, 52 Pa. St. 181, 188-9;*
Northern Trust Co. v. *Lederer, 257 Fed. (D. C.) 812.*

In *United States* v. *Jones, 236 U. S. 106,* which was a case involving money collected by the UNITED STATES under color of the legacy tax provisions of the Act of CONGRESS of June 13, 1898, and in which it was held that the tax imposed by that Act did not attach, in the case of a distributive share in the personalty of an intestate, until

debts had been ascertained and a right to the possession of a definite share had accrued, it was noted that the rights of distributees, during an administration, are secondary to those of creditors.

> "It hardly needs statement that personal property does not pass directly from a decedent to legatees or distributees, but goes primarily to the executor or administrator, who is to apply it, so far as may be necessary, in paying debts of the deceased and expenses of administration, and is then to pass the residue, if any, to legatees or distributees." *236 U. S. 106, 112.*

And in *McCoach* v. *Pratt, 236 U. S. 562*, a case under the same law as the foregoing, and also decided against the tax, the same principle was applied in the case of the estate of a testate decedent.

> ". . . the local law subordinates the rights of legatees to those of creditors in like manner as it does the rights of distributees." *236 U. S. 562, 567.*

That this transfer of the universal succession is not merely one permitted by the sovereign but is actually demanded and required by the sovereign, that is to say, is the sovereign's own act, undertaken and accomplished for purposes of sovereignty, must be evident when it is noted that the title to property sold by order of a probate court, as an incident of administration, passes by operation of law:—

> "In the Orphans' Court and all the courts which have power to sell the estates of decedents, their action operates on the estate, not on the heirs of the intestate. A purchaser claims not their title, but one paramount. The estate passes by operation of law. *2 How. 319; 11 S. & R. 426; 6 Port. 219,*

249." *Beauregard* v. *New Orleans, 18 How. 497, 503.*

The STATE commands this transfer and its command is imperative and admits no exception. The executors take the personalty by virtue of the regulative system of the STATE and decedents are not permitted to provide a different method or agency of administration than that thus prescribed. It was so held in *Wall.* v. *Bissell, 125 U. S. 382*, citing *Newcomb* v. *Williams, 9 Met. 525, 533*, and *Hunter* v. *Bryson, 5 Gill & Johns 483, 488.*

> ". . . the executors . . . take not merely as donees, by force of the gift, as *inter vivos*, but by operation of the rules of law controlling, regulating and giving effect to wills. A trustee, therefore, who is but a legatee, can take only through the executors. If a testator were to appoint no executor, or direct that the estate should go immediately into the hands of legatees or of one or more trustees for particular purposes, such direction would be nugatory and void." *125 U. S. 382, 391.*

See, also:—

> *Hagthorp* v. *Hook, 1 Gill & J.—Md.—270, 276-8;*
> *Fisher* v. *State, 106 Md. 104, 119;*
> *Smith* v. *Denny, 37 Mo. 20, 23;*
> *Southworth* v. *Southworth, 173 Mo. 59, 75;*
> *Sevier* v. *Woodson, 205 Mo. 202, 216;*
> *State* v. *Morrison, 244 Mo. 193, 202;*
> *Alvaney* v. *Powell, 55 N. C. 51, 61;*
> *Whit* v. *Ray, 26 N. C. 14.*

If the tax is to be regarded as an excise it is in terms imposed upon "the transfer" (that is, the transfer to the personal representatives), and this character is not altered by the fact that the amount of the tax is to be meas-

ured by the value of the whole estate left by the decedent. It is the same, in effect, as though the amount had been a fixed sum. Can it be doubted that an act of CONGRESS imposing a tax of (say) $100.00 upon every transfer of the estate of any decedent to an executor or administrator, for the purposes of administration in pursuance of a STATE law, would be void?

The transfer of the universal succession is, however, not merely *by command of the* STATE, *it is actually to the* STATE (*supra, 72-7*); that is to say, during the whole period of administration the possession is that of the STATE, through its court and the court's officer. It was so declared in *Byers* v. *McAuley, 149 U. S. 608,* in which it was decided that a FEDERAL court, sitting in equity, is not empowered to distribute the personal estate by a decree operating upon the administrator of an intestate, appointed by a STATE court.

> "There is nothing in any decision of this court, controverting the proposition thus stated, that the administrator is the officer of the State court appointing him, and that property placed in his possession by order of that court is in the custody of the court." *149 U. S. 608, 616.*

Applying language used by this COURT, in *California* v. *Central Pacific Ry. Co., 127 U. S. 1,* holding invalid a tax on a franchise granted by CONGRESS, to the attempt to tax this transfer:

> "To tax it is not only derogatory to the dignity, but subversive of the powers of the government and repugnant to its paramount sovereignty." *127 U. S. 1, 41.*

It is considered, then, to have been shown that (1) there was no transfer of the whole estate of the decedent

represented here except and unless the transfer of the universal succession to PLAINTIFFS-IN-ERROR was such a transfer, (2) that this transfer was a necessary step in the performance of the duty of the STATE OF NEW YORK towards its citizens and residents and the execution of its powers as a sovereign government, (3) that PLAINTIFFS-IN-ERROR took this universal succession and held the estate as officers of the STATE court which appointed them and (4) that in principle and substance their possession was that of the STATE. It seems scarcely necessary to deny that such a transfer is subject to Federal taxation, but the question will be examined.

In this aspect, an attempt, by the FEDERAL government, to tax the transfer of the universal succession to the personal representatives, appears to stand upon no stronger foundation of CONSTITUTIONAL power than would a similar attempt to tax the transfer to a STATE court, or its clerk or other officer or designated depositary, of money paid into such court in pursuance of its order entered as an incident of litigation within its jurisdiction. The want of FEDERAL power to impose such a tax seems too apparant for discussion, but it appears to involve no greater interference with STATE authority than the intrusion upon the process of administration that is now the subject of scrutiny.

The question here presented differs, it is thought, in no essential element from that examined, from the point of view of the absence of STATE power to burden by taxation acts required or incidental to the lawful performance of FEDERAL functions in *California* v. *Central Pacific Railroad, 127 U. S. 1.* That case involved the effort of the STATE to tax the exercise of a franchise conferred by CONGRESS in pursuance of its power to regulate interstate

commerce or to establish post roads. The tax was held to be beyond the power of the STATE, the COURT saying, through MR. JUSTICE BRADLEY, in respect of the franchise rights:—

> "They were granted to the company for National purposes and to subserve National ends. It seems very clear that the STATE OF CALIFORNIA can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? . . . In our judgment it cannot. . . .
>
> "Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless." *127 U. S. 1, 40-1.*

CONGRESS would be without power to amend, alter or impede in the least detail the laws of descent and distribution of any STATE. It seems inevitably to follow that it cannot accomplish an identical result by taxing any step in the administrative process or the whole of such process. But if it cannot, the exaction at issue in this proceeding seems, as a tax in respect of any transfer of the whole estate, beyond CONSTITUTIONAL defense.

The UNITED STATES have no power to tax the emoluments of any judicial officer of a STATE and this was decided in the case of a probate judge (*Collector* v. *Day, 11 Wall. 113*). How, then, shall they have power to tax the transfer that is one of the first, fundamental and characteristic steps by which the authority of every probate court is applied? The reasons given in the cited case for this restriction upon the FEDERAL taxing power seem to be at least as applicable to the acts which are appropriate and customary in the exercise of probate jurisdiction as they are to the maintenance of the judicial office or officer under whose control those acts are performed. In the

case last above cited, Mr. Justice Nelson, for the majority, Mr. Justice Bradley alone dissenting, said:—

> "Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that without them, the General government itself would disappear from the family of nations, it would seem to follow as a reasonable if not necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence." *11 Wall. 113, 125-6.*

Later in the opinion the following appears:

> ". . . the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?" *11 Wall. 113, 127.*

In *Flint* v. *Stone Tracy Co., 220 U. S. 107*, the *Corporation Tax case*, the COURT, speaking by MR. JUSTICE DAY, was careful to distinguish between (1) the taxation of the exercise of a right or privilege enjoyed under STATE authority and (2) the taxation of an exercise of STATE power.

> "It may be admitted that the reserved rights of the States, such as the right . . . to administer justice through the courts, . . . are not proper subjects of the taxing power of Congress." *220 U. S. 107, 155;* See, also, *pp. 157-8.*

So, also, in *South Carolina* v. *United States, 199 U. S. 437*, the late MR. JUSTICE BREWER, speaking for the majority of this COURT, which sustained the enforcement of a FEDERAL excise tax in respect of the sale of intoxicants by agents of the STATE, on the ground that the STATE had entered upon business of a private nature and while engaged in it was not functioning as a sovereign, said:—

> ". . . the National government . . . may do nothing by taxation in any form to prevent the full discharge by the latter* of its governmental functions . . ." *199 U. S. 437, 463.*

The question whether CONGRESS is empowered to impose taxes in respect of writs, etc., used in STATE courts, appears never to have been directly in issue in this COURT. But in *Snyder* v. *Bettman, 190 U. S. 249*, MR. JUSTICE BROWN, for the majority, referring to the fact that the INTERNAL REVENUE ACT OF 1862 (*12 Stat. 432, 483*) imposed a tax upon the probate of wills, issue of letters of administration, writs and original processes for the commencement of suits, observed that, when applied to STATE courts, its CONSTITUTIONALITY is doubtful.

**That is, the State.*

"This Act was treated as applicable to the State courts, although its constitutionality may well be doubted." *190 U. S. 249, 253.*

We shall return (*infra, 174*) to this passage, but for the present it will suffice to note that the foregoing expression of doubt was by no means the first coming from a judicial source. Some, among the many, earlier "doubts," with their results, will receive examination. The fact is that the statute referred to was considered, in this aspect, by many STATE courts of last resort and its CONSTITUTIONALITY, or applicability, was in nearly every case denied. The STATE courts generally refused to participate in its enforcement or even to inquire whether the papers presented for their consideration had or had not been stamped as provided by the FEDERAL taxing statute.

The validity of a FEDERAL internal revenue tax in respect of legal process in STATE courts was the sole issue in *Fifield* v. *Close, 15 Mich. 505*, a case determined in the SUPREME COURT OF MICHIGAN. Such a tax was held to be beyond the power of CONGRESS, JUDGE CAMPBELL, for himself and JUDGES COOLEY and CHRISTIANCY (the COURT then consisted of four judges and CHIEF JUSTICE MARTIN concurred in the result), saying:—

"The power to tax any specific thing is unlimited, or it is entirely wanting . . . and where a legislature acts within the line of its constitutional powers, the motives of its action can never be judicially reviewed, nor can courts in any way determine the propriety of its enactments . . . If Congress has the right to impose a duty or tax upon suits in courts of the States, it follows as an inevitable conclusion, that such restrictions may be laid upon these proceedings as to put an end to the entire

action of those courts and for all practical purposes, to produce the same results as if they were abolished. And the question we are called upon to decide is, therefore, whether Congress has power to put an end to the exercise of the judicial power of the States." *15 Mich. 505, 506-8.*

Later in the same opinion it was said that:—

> "There is nothing in the Constitution which can be made to admit of any interference by Congress with the secure existence of any State authority within its lawful bounds. And any such interference by the indirect means of taxation, is quite as much beyond the power of the National legislature, as if the interference were direct and extreme." *15 Mich. 505, 509.*

The SUPREME COURT OF JUDICATURE OF INDIANA considered the same question in *Warren* v. *Paul, 22 Ind. 276*, and arrived unanimously at the conclusions stated in an opinion by JUDGE PERKINS. It is there said:—

> ". . . the Federal government must be limited in its right to lay and collect stamp taxes, to the citizens, and their transactions as such, or as acting in the Federal government, officially or otherwise; and can not be laid upon and collected from individuals on their proceedings when acting, not as citizens transacting business with each other as such, but officially, or in the pursuit of rights and duties in and through State official agencies and institutions. When thus acting they are not acting under the jurisdiction nor within the power of the *United States;* not acting as subjects of that government; not within its sphere of power over them; and neither they nor their proceedings are subject to interference from the United States . . . This must be so, or the State may be annihilated at

the pleasure of the Federal government. The Federal government may, perhaps, take by taxation most of the property in a State, if exigencies require, but it has not a right, by direct or indirect means, to annihilate the functions of the State government." *22 Ind. 276, 280-1.*

The TENNESSEE case of *Union Bank* v. *Hill, 43 Tenn. 325,* is to the same effect. The COURT said:—

"If Congress can tax the judicial process of the State courts, made indispensable by the legislation of the State, for the enforcement of the rights of her citizens and the punishment of crimes, it has the right to defeat or destroy this essential element of sovereignty in the State, although it is not directly levied upon the power, or the act of exercising the power itself.

"We are unable to distinguish between levying a tax upon the exercise of the power itself, and in levying it upon all those who may seek to enforce their rights or redress their grievances, through the instrumentality of the power, or upon the means employed to that end. In either case, the effect is the same, and must paralyze or totally destroy the efficiency of this branch of the sovereign power of the people of the State." *43 Tenn. 325, 336.*

The same result was reached in the WISCONSIN case of *Jones* v. *Keep, 19 Wis. 369,* one member of the COURT dissenting. The opinion for the majority says:—

". . . a tax upon such a writ is manifestly a tax upon a necessary means used by the judicial department of the State to administer justice between its citizens. . . . It has been suggested that this tax upon State process might be sustained on the ground that it was really a tax upon the party appealing to the court for redress. He is

undoubtedly the person most immediately interested in the judicial proceedings, and the tax is paid by him. But this circumstance does not render the tax any the less obnoxious to the objection to it." *19 Wis. 369, 377-9.*

Sayles v. *Davis, 22 Wis. 217,* was decided on the authority of the foregoing and involved the question whether an internal revenue stamp could be required upon a tax deed given by the STATE OF WISCONSIN. It was held that it could not be required.

In *Craig* v. *Dimock, 47 Ill. 308,* which arose under a later statute than that of 1862, the following reference to this phase of the history of CIVIL WAR taxation is to be found:

"By the Act of Congress, approved July 1, 1862, which is amended by the Act now under consideration, legal documents, such as writs, warrants, cognovits, etc., were made subject to a duty and were required to be stamped, and if not stamped were to be deemed invalid and of no effect. At a very early period after the passage of that Act, the question arose in the courts of several of the States, as to the validity of the requirement, and although the plenary power of Congress to raise a revenue to meet the wants of the Government by the imposition and collection of taxes, duties, imposts and excises, was admitted, no reasoning urged in support of the general power was regarded as sufficient to establish the power of Congress to impose a tax upon the writs and processes of State courts. It could not be shown, and was not shown, that Congress had not only an unlimited power to tax the property of the country, and other subjects to which this power is applicable but that it could directly tax the means employed by the States in exercising their powers of government. Such was

the opposition of the State courts and of the sentiment of the country to this provision of the Act, that the law before us, and other subsequent acts of the same character, omitted the provision, and such documents are no longer declared to be taxable." *47 Ill. 308, 313.*

In *Carpenter* v. *Snelling, 97 Mass. 452,* considered by the SUPREME JUDICIAL COURT OF MASSACHUSETTS, in 1867, the question was whether a document should be admitted as evidence, although lacking the stamps required by the FEDERAL internal revenue law and despite the prohibition of that statute. The decision was that it should be admitted, the opinion by CHIEF JUSTICE BIGELOW saying:—

"We entertain grave doubts whether it is within the Constitutional authority of Congress to enact rules regulating the competency of evidence on the trial of cases in the courts of the several States, which shall be obligatory upon them. We are not aware that the existence of such a power has ever been judicially sanctioned. There are numerous and weighty arguments against its existence. We can not hold that there was an intention to exercise it, where, as in the provision now under consideration, the language is fairly susceptible of a meaning which will give it full operation and effect within the recognized scope of the Constitutional authority of Congress." *97 Mass. 452, 458.*

In ILLINOIS and other STATES somewhat higher ground was taken than was deemed sufficient for the decision of the MASSACHUSETTS case last above quoted. Thus in *Latham* v. *Smith, 45, Ill. 29,* it was unequivocally declared that the effort to prohibit the admission of unstamped documentary evidence was an UNCONSTITUTIONAL violation of the sovereignty of the STATES.

"While we concede to the Congress the power to lay and collect taxes, duties, imposts and excises to pay the debts of the Union, we deny its power to go into the States, and under the pretense of laying and collecting such taxes, take away from the States legitimate and long established rights which they have ever, and for their own preservation must be allowed to exercise without question." *45 Ill. 29, 30.*

And in a MISSISSIPPI case in which the same principle was announced, an opinion by JUDGE SIMRALL, includes the following:

". . . under the taxing power, Congress cannot intervene in the States, and impose new conditions upon the alienations and conveyances of real estate. It cannot say that a deed, complete and perfect according to the local law, shall not be evidence in the State court, unless it conforms to a requirement not exacted by the State, but prescribed by Congress. . . . Congress . . . cannot make a deed or promissory note that which it is not [so] by the local law. . . . To hold to the affirmative would be to conduct to the result that Congress may repeal or amend State laws, pertaining to subjects purely local and domestic." *Davis* v. *Richardson*, *45 Miss. 499, 505.*

The same conclusion was reached in a number of STATE cases under the SPANISH WAR REVENUE ACT OF JUNE 13, 1898. Typical among these cases is *Wade* v. *Foss, 96 Me. 230,* in which the following appears:—

"It cannot be conceded that Congress had authority to exclude as evidence in a State court that which by the laws of the State was admissible. Under our law the note was admissible, whether stamped or not." *96 Me. 230, 231.*

See, also:—

Smith v. *Short*, *40 Ala. 385, 389;*
Bumpass v. *Taggart*, *26 Ark. 398, 402;*
Duffy v. *Hobson*, *40 Cal. 240, 243;*
Trowbridge v. *Addoms*, *23 Colo. 518, 521;*
Griffin v. *Ranney*, *35 Conn. 239, 240;*
Garland v. *Gaines*, *73 Conn. 662;*
Small v. *Slocumb*, *112 Ga. 279;*
Burker v. *Green*, *48 Ill. 243, 247;*
Richardson v. *Roberts*, *195 Ill. 27;*
Wallace v. *Cravens*, *34 Ind. 534, 535;*
Hunter v. *Cobb*, *1 Bush. (Ky.) 239;*
Pargoud v. *Richardson*, *30 La. Ann. 1286;*
Holt v. *Board of Liquidation*, *33 La. Ann. 673;*
Dudley v. *Wells*, *55 Me. 145;*
Sawyer v. *Parker*, *57 Me. 39;*
Wade v. *Curtis*, *96 Me. 309;*
Green v. *Holway*, *101 Mass. 243;*
Moore v. *Quirk*, *105 Mass. 49;*
Clemens v. Conrad, *19 Mich. 170, 178-9, 185;*
Sammons v. *Halloway*, *21 Mich. 162, 163-4;*
Davis v. *Richardson*, *45 Miss. 499;*
Amos-Richia v. *Northwestern Mutual Life Insurance Co.*, *143 Mich. 684;*
People v. *Gates*, *43 N. Y. 40, 44-5;*
Moore v. *Moore*, *47 N. Y. 467, 468-9;*
Gilbert v. *Sage* *5 Lans. (N. Y.) 287, affirmed, 57 N. Y. 641;*
Haight v. *Grist*, *64 N. C. 739, 741;*
Cassidy v. *St. Germain*, *22 R. I. 53;*
Kennedy v. *Roundtree*, *59 S. C. 324;*
Miller v. *Morrow*, *5 Heisk. (Tenn.) 688;*
Walt v. *Walsh*, *10 Heisk. (Tenn.) 314;*
Sporrer v. *Eifler*, *48 Tenn. 633, 638-9;*
Insurance Co. v. *Estes*, *106 Tenn. 472, 484-5;*

Watson v. *Mirike, 25 Texas Civ. App. 527;*
Hale v. *Wilkinson, 21 Grat. (Va.) 75, 79;*
Dawson v. *McCarty, 21 Wash. 314, 316;*
Freedman v. *Sigel, 10 Blatch. 327, 331.*

The same limitation upon the FEDERAL power to tax was held to inhibit a stamp tax upon bonds given to a STATE by its officers to secure the faithful performance of their obligations. It was so decided in *State* v. *Garton, 32 Ind. 1,* where it was said:—

> "But the United States are required by the Constitution to guarantee to every State in this Union a republican form of government. *Const. Art. 4, Sec. 4.*"
>
> "This requirement would be a mockery, if Congress, under the right to tax for the general welfare, could prevent the exercise of the functions of the State government." *32 Ind. 1, 10.*

In *Ambrosini* v. *United States, 187 U. S. 1,* this COURT had under consideration the very similar question whether the stamp tax established by Schedule A of the Act of June 13, 1898, was due in the case of a bond required in the STATE OF ILLINOIS as one of the conditions of the grant of a license to sell intoxicants. The decision was against the tax. The opinion of the COURT, by MR. CHIEF JUSTICE FULLER, says:

> "The general principle is that as the means and instrumentalities employed by the General government to carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the General government. It rests on the law of self preservation, for any government, whose means employed in conducting its strictly governmental operations are subject to the control of another and

distinct government, exists only at the mercy of the latter." *187 U. S. 1, 7.*

The FEDERAL cases cited at the end of the opinion just quoted are of present significance. They include *United States v. Owens, 100 Fed. (D. C.) 70,* arising under the same statute and holding a similar bond required by the STATE OF MISSOURI untaxable; *Stirneman v. Smith, 100 Fed. (C. C. A.) 600, 602-4,* in which a certificate of a notary public to depositions for use in judicial proceedings was held not to be subject to the tax, and *Warwick v. Bettman, 102 Fed. (C. C.) 127, affirmed, 108 Fed. (C. C. A.) 46,* in which the same conclusion was reached as to the bond required by the STATE OF OHIO from notaries public. The last cited case was heard by MR. JUSTICE DAY, the late MR. JUSTICE LURTON and JUDGE SEVERENS, then constituting the CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, and the opinion of the COURT, by MR. JUSTICE LURTON, assigns the UNCONSTITUTIONALITY of the tax as the primary reason for the judgment, although also concluding that CONGRESS intended to exempt such bonds from the general language of the enactment. The opinion asks the following:—

> "Can it be that that which the one government has the right to create, the other has the power to destroy?" *108 Fed. 46, 49.*

TO PLAINTIFFS-IN-ERROR it seems that, as the STATE OF NEW YORK created, and had the right to create, their universal succession as personal representatives of J. HARSEN PURDY, the foregoing inquiry is as pertinent to the effort to tax that succession, as it could have been to the effort to tax the bond of a notary public. But the CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT answered that the FEDERAL government had not the right to tax the notary's bond, saying:

"The principle is, that the power to tax is the power to control, the power to destroy, and that any government is at the mercy of another which has the power to tax the instrumentalities by which it governs." *108 Fed. 46, 50.*

The familiar principle thus applied was well stated by Mr. Justice Gray, delivering the opinion of this Court in *Van Brocklin* v. *Tennessee, 117 U. S. 151*, as follows:

". . . the power to destroy may defeat and render useless the power to create; and there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control." *117 U. S. 151, 155.*

It is submitted that the universal succession of personal representatives is as much an "instrumentality" of the government of a State, exercising its sovereign and exclusive power to administer the estates of its own decedents, as the probate judge (*Collector* v. *Day, supra*), who exists to supervise that administration. That succession which, in this case, it is sought to burden with a Federal tax, *is the initial step on which every subsequent exercise of this* State *power is founded and without which there could be no administration.* It is not more difficult to imagine the abolition of probate courts and probate judges than it is to conceive of any process of administration which could protect creditors of decedents and provide for the eventual devolution of their net estates without first setting up a universal succession. *If the latter is taxable, by the* Federal *government, it would seem that the sovereign power to administer decedents' estates is held by the* States *upon precarious tenure and at the mercy of another sovereign, the* Federal *govern-*

ment. If that be true, the STATES are no longer sovereign in this domain.

The tax condemned in *McCulloch* v. *Maryland, 4 Wheat. 316,* was "on the operations of the bank" (*p. 436*), lawfully created by the UNITED STATES as an instrument in the exercise of CONSTITUTIONAL power, just as a tax upon the transfer of the universal succession to the personal representatives of a decedent, such universal succession being merely an incident in the exercise of STATE power, would seem to be a tax upon the operations of STATE government. Yet even in that early case it was recognized that the principle of the exemption of FEDERAL exertions of power from STATE taxation might carry with it, as an inevitable consequence, a similar exemption on the part of the STATES (*4 Wheat. 316, 436*). Indeed, in that case, Mr. CHIEF JUSTICE MARSHALL laid down the rule of exemption in terms that, unless it applies to the STATES, would intolerably diminish the STATE authority and utterly extinguish the theory of their sovereignty in any field of government. In the rule of exemption is found, he declared, relief from destructive clashings of governmental powers, which otherwise would be incompatible with equality of right to exercise recognized powers of sovereignty.

> "We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the

means employed by the government . . . is itself an abuse, . . ." *4 Wheat. 316, 430.*

The elision, from the last sentence of the foregoing extract, of words limiting the statement to FEDERAL means, does not in any degree extend its present effect, for repeated decisions have applied this principle of immunity from taxation to the acts and instrumentalities of the STATES.

The principle that the power to tax is the power to destroy is not applicable where there is power to tax, but only where such power does not exist. It is submitted that no FEDERAL power existed to tax the transfer of the universal succession to the assets and liabilities of J. HARSEN PURDY, the STATE OF NEW YORK having established that succession as *the initial step in its process for the protection of his creditors and others interested in his estate,* for such a tax would burden the power to regulate (*Knowlton* v. *Moore, 178 U. S. 41, 60*).

> "It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed." *Brown* v. *Maryland, 12 Wheat. 419, 439.*

See, also:

Weston v. *Charleston, 2 Pet. 449, 466;*
Bank of Commerce v. *City of New York, 2 Black. 620, 634, 635;*
Pacific Insurance Co. v. *Soule, 7 Wall. 433;*
United States v. *Baltimore & Ohio R. R. Co., 17 Wall. 322;*
Railroad Company v. *Husen, 95 U. S. 465, 472;*

National Bank v. *United States*, *101 U. S. 1, 6;*
Webber v. *Virginia*, *103 U. S. 344, 350;*
Van Brocklin v. *Tennessee*, *117 U. S. 151, 155-6;*
California v. *Central Pacific R. R. Co.*, *127 U. S. 1;*
Mr. Chief Justice Taney, Letter to Secretary of the Treasury, *157 U. S. 701, 701;*
Knowlton v. *Moore*, *178 U. S. 41, 60;*
Fairbank v. *United States*, *181 U. S. 283, 290-1;*
United States v. *Doremus*, *249 U. S. 86, 94;*
Evans v. *Gore*, *253 U. S. 245.*

The principle of the supremacy of the STATES within the fields of sovereignty not entrusted to the FEDERAL government by express or implied delegations of power and the immunity from FEDERAL taxation of the CONSTITUTIONAL means adopted by the STATES in the exercise of their lawful functions has been asserted in a large number of cases. Some of them are cited below:—

Collector v. *Day*, *11 Wall. 113, 123-7;*
Worcester v. *Georgia*, *6 Pet. 515, 570;*
New York v. *Miln*, *11 Pet. 102, 138;*
Passenger Cases, *7 How. 283, 399;*
Bank of Commerce v. *City of New York*, *2 Black. 620;*
Lane County v. *Oregon*, *7 Wall. 71, 76;*
Texas v. *White*, *7 Wall. 700, 725;*
Veazie Bank v. *Fenno*, *8 Wall. 533, 541, 547;*
Ward v. *Maryland*, *12 Wall. 418, 427;*
United States v. *Baltimore & Ohio R. R. Co.*, *17 Wall. 322;*
Railroad Company v. *Peniston*, *18 Wall. 5, 30, 31;*
United States v. *Cruikshank*, *92 U. S. 542, 550;*
Farrington v. *Tennessee*, *95 U. S. 679;*

Pollock v. Farmers' Loan & Trust Co., 157 *U. S.* 429, 560, 581-4, 652;
Plummer v. *Coler*, 178 *U. S.* 115;
Ambrosini v. *United States*, 187 *U. S.* 1, 7;
South Carolina v. *United States*, 199 *U. S.* 437, 448, 451, 463;
Flint v. *Stone Tracy Co.*, 220 *U. S.* 107, 152, 155-8, 172;
Hammer v. *Dagenhart*, 247 *U. S.* 251, 275;
South Covington & Cincinnati Street Ry. Co. v. *Kentucky*, 252 *U. S.* 399, 404;
Evans v. *Gore*, 253 *U. S.* 245, .

It seems to be precisely such acts of STATE authority as the enforcement of the transfer of the universal succession to decedents' assets and obligations which are necessarily beyond the scope of the FEDERAL power to tax. This seems to be indicated by the words of Mr. CHIEF JUSTICE CHASE, in *Veazie Bank* v. *Fenno*, 8 *Wall.* 533. He said, ***inter alia:***

> "It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress." 8 *Wall.* 533, 547.

The foregoing was approvingly quoted in *Flint* v. *Stone Tracy Company*, 220 *U. S.* 107, 155, where, after reviewing certain of the cases, the following was added:—

> "The cases unite in exempting from Federal taxation the means and instrumentalities employed in carrying on the governmental operations of the State." 220 *U. S.* 107, 157-8.

If the transfer to PLAINTIFFS-IN-ERROR of their universal succession as personal representatives was then a means adopted by the STATE OF NEW YORK, as it seems clearly to have been, to perform its duty to protect the rights of creditors and others in the estate of their decedent, that transfer would appear to be excluded from the FEDERAL power to tax.

> ". . . the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope." *Knowlton v. Moore, 178 U. S. 41, 60.*

SIXTH.

If the exaction complained of is a tax in respect of the transfer to those beneficially entitled, or an income tax, it is unconstitutional because of its gross and capricious inequalities.

DEATH DUTIES may be a "burden cast upon the recipient" (*Knowlton* v. *Moore, 178 U. S. 41*) and it has been noted that they may partake, also, of the nature of income taxes (*Scholey* v. *Rew, 23 Wall. 331; Knowlton* v. *Moore, 178 U. S. 41, 79*). Every death duty, whatever its actual form or technical character, necessarily diminishes the estate and reduces the total available for distribution and therefore must diminish the value of the right of one or more, if not all, among the beneficiaries. If income can be defined so as to include values received by testate or intestate succession, it may be, although it is unnecessary to this case to press the inquiry to a conclusion, that taxes upon income of this kind could be justified under the Six-

TEENTH Amendment, always provided that they were not otherwise obnoxious to CONSTITUTIONAL principles.

It is proposed, under the present heading, to demonstrate, if possible, that the exaction complained of in this case, could not be valid even if this exaction could be considered either (1) as a tax upon the exercise of rights to receive under the will of J. HARSEN PURDY or (2) as taxes upon the income which those beneficially entitled, received or will receive, in the form of legacies arising out of his estate. It is believed that, in either case, the gross and capricious inequalities arising from the manner in which the amount to be paid is determined, that is in the method of measurement of the "tax" by the amount of the whole estate, provided in the statute, would vitiate the law and render it CONSTITUTIONALLY NUGATORY AND VOID.

Discussion has arisen as to how the burdens resulting from the exaction now at issue, ought finally to rest or to be apportioned. The Act (*Section 207*) requires payment to be made by the administrator or executor and (*Section 208*), apparently, out of the personalty unless it is insufficient. Yet a lien (*Section 209*) rests upon the whole gross estate, including realty, except that it does not attach to property required to meet "charges against the estate and expenses of its administration." It would appear, therefore, that IN CASES OF INTESTACY:—

1. The exaction must be met out of the personalty, if it is sufficient, and its burden rests, therefore, upon the distributees. The heirs, as such, would make no contribution towards the payment, although its amount would be increased in proportion to the value of the realty, so that, *in States and in instances in which the succession to realty differs from the distribution of per-*

sonalty the apportionment of the exaction must differ from the apportionment of benefits out of the estate.

2. If the personalty is insufficient to meet the exaction it would, first, absorb all the personalty and, second, take some part of the real property; thus also effecting *an apportionment of burdens differing from the apportionment of benefits.*

A few simple illustrations will suggest the extent of the inequalities that may arise in connection with estates of intestates. These illustrations are based upon the rates of the Act of September 8, 1916, which were the statutory rates until the Act of March 3, 1917, took effect (*supra, 12*), but the increased exactions under the successive acts of March 3, 1917, October 3, 1917, and February 24, 1919, are dealt with in footnotes.

Let it be supposed that one domiciled in New York dies intestate and without issue, survived by a widow and one sister and leaving a gross estate of $1,000,000.00, subject to funeral expenses, debts and administration expenses (including New York death duties) aggregating $90,000.00. The exemption of $50,000.00 would then leave a taxable "net estate," under the Act of September 8, 1916, of $860,000.00 and the tax would be, at the rates originally enacted, $34,000.00, as follows:

	Amount	*"Tax"*
Exempt	$50,000.00	none
One per cent on	50,000.00	$500.00
Two per cent on	100,000.00	2,000.00
Three per cent on	100,000.00	3,000.00
Four per cent on	200,000.00	8,000.00
Five per cent on	410,000.00	20,500.00
Total	$910,000.00	$34,000.00

For the purposes of these illustrations, the New York transfer (succession) tax is treated, as appellants respectfully submit that it should always be treated, as among the charges that are deductible before computing the Federal "tax." Under the laws of New York, the widow would receive a life interest in one-third of the intestate's real property and, absolutely, one-half plus $4,000.00 of his personal property; the balance would pass to the sister. Therefore:—

EXAMPLE A. If the estate consisted wholly of personal property the sum available for distribution would amount to $876,000.00 ($910,000.00 less $34,000.00 "tax") of which the widow would take $442,000.00 and the sister $434,000.00. Except for the Federal "tax," the widow would have received $459,000.00 and the sister $451,000.00 so that, in the most practical sense, the widow and the sister would each be "taxed" $17,000.00, the former at the rate of 3.70 per cent and the latter at the rate of 3.77 per cent.*

EXAMPLE B. But if the estate postulated above had included $750,000.00 in real estate, $500,000.00, in value, of such realty would have passed immediately to the sister, who would also have the remainder after the widow's life estate in the balance. Assuming the age and physical condition of the widow to render this life interest worth $125,000.00, the widow's share of the whole estate, except as affected by the Federal "tax," would be $209,000.00 and the sister's share $701,000.00. But the "tax" would be paid wholly out of the personalty.

*Under the increased rates of the Act of March 3, 1917, the "tax" would have been $51,000 and the widow would have paid at the rate of 5.56 per cent; the sister, at the rate of 5.65 per cent. Under the Act of October 3, 1917, the "tax" would have been $68,000.00 and the respective rates 7.40 and 7.54 per cent. Under the present law the "tax" would be $40,300.00 and the rates 4.39 and 4.47 per cent, respectively.

Therefore the personal property left for distribution would be but $126,000.00 ($160,000.00 less $34,000.00) and the widow would really receive but $192,000.00, while the sister would receive $684,000.00. Thus the "tax" would diminish the widow's interest $17,000.00 or 8.13 per cent and the sister's interest $17,000.00 or 2.43 per cent. In other words, each would pay the same amount of "tax," although one would actually receive more than three and one-half times as much as the other.*

EXAMPLE C. One receiving the whole of an estate of an intestate amounting to $701,000.00 would pay at the original rates, $23,550.00 or 3.36 per cent.†

EXAMPLE D. One receiving the whole of an estate of an intestate amounting to $209,000.00 would pay, at the original rates $2,770.00 or 1.33 per cent.‡

Some of the inequalities that might easily take place are illustrated by the following table which shows the variations that would result in the application of this exaction, as to a distributive share of $10,000.00, the estates supposed consisting wholly of personal property, and varying from $50,000.00 to $20,000,000.00.

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*Under later rates the "tax" deducted from each interest would have been successively $25,500, $34,000 and $20,150. The sister would have paid, under the respective changes 3.64 per cent, 4.85 per cent, or 2.87 per cent, and the widow 12.20 per cent, 16.27 per cent, or 9.64 per cent.

†Under successive changes the amount and rate would have been $35,325 and 5.04 per cent, $47,100 and 6.72 per cent and $25,560.00 and 3.65 per cent.

‡At the rates of March 3, 1917, the payment would have been $4,155.00 or 1.99 per cent; at those of October 3, 1917, $5,540.00 or 2.65 per cent, and at the present rates, the same as under the original rates.

Value of the estate, in excess of debts and expenses. State taxes deducted*	Net estate as defined by Section 205, of the Act	Number of next of kin	Value of each distributive share	Tax on each distributive share	
				Amount	Percent of value
$50,000	None	5	$10,000	None	None
60,000	$10,000	6	10,000	$16.67	0.17
80,000	30,000	8	10,000	37.50	.38
100,000	50,000	10	10,000	50.00	.50
200,000	150,000	20	10,000	125.00	1.25
350,000	300,000	35	10,000	200.00	2.00
500,000	450,000	50	10,000	270.00	2.70
1,000,000	950,000	100	10,000	385.00	3.85
2,000,000	1,950,000	200	10,000	490.00	4.90
20,000,000	19,950,000	2,000	10,000	918.00	9.18

*The amounts in this column are those that would be subject to the order of distribution.

The foregoing shows that a distributive share worth $10,000.00 would pay nothing if it arose out of an estate of $50,000.00; $16.67, or one-sixth of one per cent if it arose out of an estate of $60,000.00; $50.00, or one-half of one per cent if it arose out of an estate of $100,000.00; $200.00, or two per cent if it arose out of an estate of $350,000.00; $490.00, or nearly five per cent if it arose out of an estate of $2,000,000.00, and $918.00 or over nine per cent if it arose out of an estate of $20,000,000.00. The above computations are based on the original rates; at the increased rates of the later acts, the disparities would appear much greater.

If the exaction now complained of could be considered valid—

> "It would thus come to pass that the same person, occupying the same relation, and taking in the same character, two equal sums from two different persons, would pay in the one case more than twice the tax (*In the above example more than fifty times*

the 'tax'—COUNSEL) that he would in the other."
—*Knowlton* v. *Moore, 178 U. S. 41, 76.*

Opinion is not uniform as to the manner in which the burden should be borne when the decedent leaves a valid will. It has been held, in some STATE jurisdictions, that, in the absence of controlling language in the will, the burden should be apportioned among all beneficiaries. To that effect are:

> *Matter of Douglass, 104 Misc. (N. Y.) 359;*
> *Estate of T. Morris Knight (Philadelphia County Orphans' Court, October Term, 1917, No. 349); affirmed, 261 Pa. St. 537;*
> *Fuller* v. *Gale, 103 Atl. 308 (N. H.).*

The better opinion appears to be, however, that the whole exaction must fall upon the residuary estate. It was so held by HENRY W. JESSUP, Esquire, as referee *in re Estate of James Buchanan Brady, New York Law Journal, January 11, 1919,* and by the APPELLATE DIVISION FOR THE FOURTH DEPARTMENT OF NEW YORK, *in Matter of Hamlin, 185 App. Div. 153; affirmed, 226 N. Y. 407.* In the former case, the REFEREE said, in part:

> "What the present Federal tax law taxes is not the interest to which some person or group of persons succeeds, but *the interest which ceased by reason of the death of the owner of the 'estate.'* And the estate which is distributable in payment of legacies is what is left after 'the interest which ceased by reason of the death' 'has yielded its contribution to the United States.'
>
> "This being the case the position of a residuary legatee is not deemed to have been in the contemplation of the Congress in enacting the law. It is lamentably true that many draughtsmen of wills

have the habit of directing testators to provide first for specific legacies in kind or in money, and to place these in priority of position and of payment in the will, and then to dispose of the general estate to the primary objects of the decedent's bounty, with the result that if there is any change, either by diminution of the property by the testator's hazards of business, or as in this case by the imposition of taxes which the testator did not know of or contemplate, those who are really the primary objects of his bounty may become the persons who have to bear the burden of such loss or payment.

". . . But in this case . . . I am bound to hold that the position of a residuary legatee is simply what it always is in law, *i. e.*, that the residuary legatee is the one to get what is left, *if there is anything left*, . . . and . . . the Federal government is deemed to be paid or to be payable before there is any computation in respect to the payment of any legacies at all and in ascertaining whether or not the legacies or any of them must lapse or be abated."

See also:

> *Estate of Roebling*, *89 N. J. Eq. 163, 166;*
> *Plunkett* v. *Old Colony Trust Co.*, *233 Mass. 471, 475-6.*

"One curious effect of the law is that it bears solely on the residue, and as probably nine wills out of ten leave the residue to the wife or children of the testator, this results in a tax on lineals exempting collaterals and strangers." *Hugh Bancroft, Inheritance Taxes for Investors, 3d Ed., pp. 98-9.*

Assuming that the view last above stated is correct, and that, therefore, the burden, IN CASES OF TESTACY, falls primarily upon the residuary estate, it follows that:—

1. If the residuary personal estate is sufficient to meet the exaction, no specific or general legacy and no devise of real property is affected thereby; thus again producing disproportion between burdens and benefits.

2. If the residuary personal estate is not sufficient to meet the exaction, the prior legacies must abate and, if these do not suffice, some portion of the realty must be taken; but still burdens and benefits fall disproportionately.

The following examples of the operation of this exaction, based on the original rates (*supra, 12*), are significant:—

EXAMPLE 1. Suppose the case of a gross estate of $1,000,000.00 with deductions of $90,000.00 for debts and funeral and administration expenses and $50,000.00 for the exemption, leaving a net (taxable) estate, as defined in the statute, of $860,000.00. This would leave $910,-000.00 for distribution among the legatees, as the "net estate" used in calculating the exaction is exclusive of the $50,000.00 exemption. Assume that the whole estate is left to the decedent's widow. The "tax," at the rates in force prior to the increases effected by the amendment of March 3, 1917, would be $34,000.00 (*supra, 12*).

That is to say, the widow in this case would actually take but $876.000.00 (she would receive the exempt $50,000.00 as well as the taxable "net estate"), having paid $34,000.00 or about 3.74 per cent.*

EXAMPLE 2. Suppose the same gross and net estate as in *Example 1,* but that the testator left $100,000.00 to a hospital and $200,000.00 to a daughter, leaving the

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*Under the increased rates of the Act of March 3, 1917, the "tax" would have been $51,000.00 or 5.60 per cent; under those of October 3, 1917, $68,000 or 7.47 per cent. and at the present rates, $40,300 or 4.43 per cent.

residuary estate to his widow. The exaction would still be $34,000.00 and the whole burden would still fall upon the residuary estate. In this case the widow would receive $610,000.00 less the $34,000.00 "tax," or $576,000.00 and the rate on her interest would be about 5.57 per cent.*

EXAMPLE 3. Suppose the same gross and net estate as in *Examples 1 and 2*, but that the decedent has left $200,000.00, each, to four daughters and has made a son the residuary legatee. The exaction would still be $34,000.00, would still fall wholly upon the residuary estate and the son would take $110,000.00 less $34,000.00 or $76,000.00. The "tax" on his interest would be at the rate of 30.91 per cent.†

EXAMPLE 4. Suppose the same gross and net estates as in *Examples 1,2 and 3*, but legacies of $220,000.00, each, to four daughters, the son being residuary legatee. The residuary estate would then be only $30,000.00 and as the exaction would still be $34,000.00 it could not all be paid out of the residuary estate. Therefore, the residuary legatee would take nothing (in other words the "tax" on his interest would be 100 per cent) and the prior legacies to the daughters would have to abate enough to make up the balance, $4,000.00, of the exaction. Each daughter would receive $220,000.00 less $1,000.00, or $219,000.00. Thus the residuary legatee would pay a "tax" of one hundred per cent and the general legatees would pay at the rate of something less than one-half of one per cent. But even at that low rate they would fare

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*Under the successive amendments the percentages exacted would have been 8.36, 11.15 and 6.61, respectively.

†Or, under the successive amendments, 46.36 per cent, 61.82 per cent or 36.64 per cent.

worse than most specific and general legatees for commonly only residuary legatees pay anything.*

EXAMPLE 5. X, being the sole residuary legatee, received $100,000.00 out of a net estate of $860,000.00. He pays a "tax" of $34,000.00, or thirty-four per cent.**

EXAMPLE 6. Y, being one of eight residuary legatees, receives $100,000.00 out of a net estate of $860,-000.00. He pays a "tax" of $4,250.00, or 4.25 per cent.***

EXAMPLE 7. Z, being a general legatee, received $100,000.00 out of a net estate of $860,000.00. He pays nothing.

EXAMPLE 8. John Doe, being sole residuary legatee, receives $50,000.00 which is the whole estate in excess of charges and claims. He pays nothing.

EXAMPLE 9. Jane Doe, being the sole residuary legatee, receives $50,000.00 out of an estate of $100,000.00 in excess of charges and claims. She pays $500.00, or one per cent.†

EXAMPLE 10. Richard Roe, being the sole residuary legatee, receives $50,000.00 out of an estate of $500,000.00 in excess of charges and claims. He pays a "tax" of $13,500.00, or twenty-seven per cent.‡

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*Under all amendments the exaction in respect of the son would be 100 per cent; under the successive changes in rates the daughters' shares would have paid 2.40, 4.34 and 1.18 per cent, respectively.

**Or under subsequent enactments, in their chronological order, 51, 68 or 40.3 per cent.

***Or under successive amendments, 6.38 per cent, 8.50 per cent or 5.04 per cent.

†If under the Act of March 3, 1917, she should pay $750.00 or 1.5 per cent; under that of October 3, 1917, $1,000.00 or two per cent and under the Act of February 24, 1919, the same as under the original Act.

‡The same under present law; under the Act of March 3, 1917, the amount taken would have been $20,250 and the rate 40.62 per cent; under the Act of October 3, 1917, $27,000 or 54.00 per cent would have been taken.

EXAMPLE 11. Rachel Roe, being a general legatee, receives a legacy of $500,000.00 out of a net estate of $20,000,000.00 (or any other amount). She pays nothing.

In the case of a decedent dying while the original rates were in force and leaving $1,000,000.00 in excess of debts and expenses of administration the exaction would be $38,500.00. Then:—

1. If such decedent died intestate, a distributee receiving $500,000.00 (before deduction of the "tax") would pay $19,250.00 or 3.85 per cent,

2. If such decedent left a valid will, one who received a general or specific legacy of $500,000.00 would pay nothing, and

3. If such decedent left a valid will, a sole residuary legatee who received $500,000.00 (before deduction of the "tax") would pay $38,500.00 or 7.70 per cent.

> "But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth $1,000.00, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundred-fold the amount."— *Knowlton* v. *Moore, 178 U. S. 41, 76.*

The following table shows the amounts that would be exacted, and the rate, under the Act of September 8, 1916, from a residuary estate of $50,000.00, arising from a total "net estate" of different values, still on the assumption that the correct view is that which makes the burden rest primarily upon the residuary estate:

Value of the estate, in excess of debts and expenses* (State taxes deducted)	"Net estate," as defined by Section 203 of the Act	"Tax"			
		Amount	Per cent of value passing to beneficiaries**	Amount payable out of residuary estate	Per cent payable out of residuary estate
$50,000	none	none	none	none	none
51,000	$1,000	$10	0.02	$10	0.02
100,000	50,000	500	.5	500	1.00
200,000	150,000	2,500	1.25	2,500	5.00
300,000	250,000	5,500	1.83	5,500	11.00
500,000	450,000	13,500	2.70	13,500	27.00
1,050,000	1,000,000	41,000	3.90	41,000	82.00
2,050,000	2,000,000	101,000	4.93	50,000***	100.00***
3,050,000	3,000,000	171,000	5.61	50,000***	100.00***
4,050,000	4,000,000	251,000	6.20	50,000***	100.00***
5,050,000	5,000,000	341,000	6.75	50,000***	100.00***
6,050,000	6,000,000	441,000	7.29	50,000***	100.00***
7,050,000	7,000,000	541,000	7.67	50,000***	100.00***
8,050,000	8,000,000	641,000	7.96	50,000***	100.00***
9,050,000	9,000,000	741,000	8.19	50,000***	100.00***
10,050,000	10,000,000	841,000	8.37	50,000***	100.00***
15,050,000	15,000,000	1,341,000	8.91	50,000***	100.00***
20,050,000	20,000,000	1,841,000	9.18	50,000***	100.00***

The foregoing shows, for example, that a residuary estate of $50,000.00, arising out of an estate worth $3,050,000.00 in excess of debts and expenses, would be wholly absorbed by the exaction, which would amount to $171,000.00. The difference of $121,000.00, between the total sum exacted and the residuary estate, would have

*These figures represent the totals actually passing to heirs, devisees, distributees and legatees.

**These rates, being on the basis of the actual net estate (*column* 1) are, of course, slightly lower than those based on the taxable "net estate" (*column* 2), defined by section 203, which is invariably $50,000.00 less.

***In these cases the exaction would exceed the residuary estate and prior legacies would, therefore, abate. There would be nothing for the residuary legatee, or legatees, and other legacies would abate.

to be obtained at the expense of prior legacies which would abate. The table shows that THE RATE OF THE EXACTION, in respect of a residuary estate of $50,000.00, WOULD VARY FROM NOTHING TO ONE HUNDRED PER CENT.

If, however, the exaction may be *pro rated* or apportioned among all beneficiaries, in amounts proportioned to the values received, the rate and amount of the "tax" would vary with regard to a legacy of $50,000.00 (residuary or other), as follows:

Value of the estate, in excess of debts and expenses* (State taxes deducted)	"Net estate," as defined by Section 203 of the Act	"Tax"		"Tax" on legacy of $50,000.00	
		Amount	Percent of value passing to beneficiaries**	Amount	Percent
$50,000	none	none	none	none	none
51,000	$1,000	$10	0.02	$9.80	0.02
100,000	50,000	500	.5	250.00	.5
200,000	150,000	2,500	1.25	625.00	1.25
300,000	250,000	5,500	1.83	916.67	1.83
500,000	450,000	13,500	2.70	1,350.00	2.70
1,050,000	1,000,000	41,000	3.90	1,952.38	3.90
2,050,000	2,000,000	101,000	4.93	2,463.41	4.93
3,050,000	3,000,000	171,000	5.61	2,803.28	5.61
4,050,000	4,000,000	251,000	6.20	3,098.77	6.20
5,050,000	5,000,000	341,000	6.75	3,376.24	6.75
6,050,000	6,000,000	441,000	7.29	3,644.63	7.29
7,050,000	7,000,000	541,000	7.67	3,836.88	7.67
8,050,000	8,000,000	641,000	7.96	3,981.37	7.96
9,050,000	9,000,000	741,000	8.19	4,093.92	8.19
10,050,000	10,000,000	841,000	8.37	4,184.08	8.37
15,050,000	15,000,000	1,341,000	8.91	4,455.15	8.91
20,050,000	20,000,000	1,841,000	9.18	4,591.02	9.18

*These figures represent the totals actually passing to heirs, devisees, distributees and legatees.

**These rates, being on the basis of the actual net estate (*column* 1) are, of course, slightly lower than those based on the taxable "net estate" (*column* 2), defined by section 203, which is invariably $50,000.00 less.

The last foregoing table illustrates the fact that even though it should be considered that this exaction might be apportioned among all the beneficiaries of an estate, the amount taken on account of, and out of, an inheritance of a particular amount would vary, with the value of the whole estate—thus VARYING BY REASON OF MATTERS OF NO SIGNIFICANCE TO THE PERSON AT WHOSE EXPENSE THE PAYMENT WOULD BE MADE.

If it is true that personalty alone, if sufficient, must respond for this exaction, although the value of the realty must be included in computing its amount, a new and different set of disparities would arise. Although as significant as the others these do not require separate illustration.

Examples as expressive as the foregoing of the utter absence of relation between the amount of the particular exaction in respect of any benefit received out of an estate coming within the purview of Sections 200 *et seq.* of the Act of September 8, 1916, and the amount of such benefit, could be multiplied without end. So far as any substantial interest of any legatee or beneficiary is concerned, the result of "tax" or no "tax," light "tax" or heavy "tax," is wholly accidental. His benefit from the estate may be great and he may pay no "tax;" it may be small and he may pay an heavy "tax." THE LAW OPERATES BY NO CERTAIN RULE upon an amount or benefit, BUT ITS BURDENS FALL WITH CAPRICIOUS INEQUALITY, permitting some interests entirely to escape, wholly absorbing other interests, burdening one with an heavy exaction and lightly touching the benefit of another similarly situated. In any and every case in which a legacy or distributive share or other interest in a decedent's estate is subjected to an exaction under this law, the amount taken from the ben-

eficiary is determined not by any value that has passed to him out of the estate, but by the whole value passing to all the beneficiaries, including those among them who pay no "tax" at all. In other words, the "tax" is laid with regard to the—

> ". . . property of one person accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another." *Knowlton v. Moore, 178 U. S. 41, 77.*

Or, perhaps, the sum of the property of many others. The quotation is from the opinion of Mr. CHIEF JUSTICE WHITE, then ASSOCIATE JUSTICE, who spoke for the majority of this COURT in ***Knowlton* v. *Moore, supra.*** In that case it was contended, for the COLLECTOR OF INTERNAL REVENUE, that the rate of tax must be determined (as it plainly must be determined under the Act of September 8, 1916), by the value of the whole estate. But under the Act of 1898, unlike the present Act, it was possible to construe the statutory language as intending that the rate should be determined by the value of each legacy or share rather than by the value of the whole estate. And this COURT declared that CONGRESS had intended that the rate should depend upon the value received by the particular legatee or distributee affected, strongly intimating that if it had been necessary to hold otherwise the Act would have been UNCONSTITUTIONAL. The opinion should be quoted.

> "Granting, however, that there is doubt as to the construction, in view of the consequences which must result from adopting the theory that the Act taxes each separate legacy by a rate determined, not by the amount of the legacy, but by the amount of the whole personal estate left by the deceased.

we should be compelled to solve the doubt against the interpretation relied on. The principle on which such construction rests was thus defended in argument. The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth $1,000.00, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth an hundred-fold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus a person dying, and leaving an estate of $10,500.00, bequeaths to an hospital $10,000. The rate of tax would be five per cent, and the amount of tax $500.00. Another person dies at the same time, leaves an estate of $1,000,000.00 and bequeaths $10,000.00 to the same institution. The rate of tax would be 12½ per cent and the amount of tax $1,250.00. It would thus come to pass that the same person, occupying the same relation, and taking in the same character two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other. In the arguments of counsel tables are found which show how inevitable and profound are the inequalities which the construction must produce. Clear as is the demonstration which they make, they only serve to multiply instances afforded by the one example which we have just given.

"We are therefore bound to give heed to the rule, that where a particular construction of the statute will occasion great inconvenience or produce

inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute." *178 U. S. 41, 76-7.*

And, in the paragraph next after the foregoing, it is said that:—

"It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems." *178 U. S. 41, 77.*

It was unnecessary, in the case cited, to determine the question suggested in the last foregoing quotation; it may not be necessary to determine it in the instant proceeding. It will surely be necessary, however, if it is considered that there is any warrantable interpretation of Sections 200 *et seq.* of the Act of September 8, 1916, by which the exaction here the subject of complaint could be considered as either, (1) a tax in respect of the right to receive by testate or intestate succession or (2) an income tax in respect of income received in the form of property passing by either form of succession. Therefore, it is now urged that (if the exaction here the subject of complaint is considered as (1) a tax in respect of the exercise of a right to receive a legacy or (2) as a tax upon income in the form of legacies) the amount herein sought to be recovered was taken from PLAINTIFFS-IN-ERROR under an UNCONSTITUTIONAL attempt to exact a tax, the vice inherent in the exaction being that its capricious and gross inequality—

1. Violate "limitations arising from those fundamental conceptions of free government which underlie all constitutional systems," and

2. Place the exaction outside of any Constitutional definition of the power to tax, and therefore outside of any authority conferred upon Congress.

It would be merely pedantic to attempt a separation of the considerations supporting the above suggestions. Undoubtedly justification for the present exaction must be found, if it is to be found at all, under the taxing power of CONGRESS, and it is equally clear that the taxing power of CONGRESS is restricted by certain fundamental principles and that it cannot be made to justify any exaction which is not actually a TAX. But it will probably be found (1) that these fundamental principles do not go further than to prevent taxation for other than public purposes or unequal to the point of injustice and (2) that the terms "tax," "taxes," and "taxation," and their various equivalents, when used in a CONSTITUTIONAL sense, always include conceptions of public purpose and substantial equality.

Not always is that a tax which is called a tax. The power to tax is broad and comprehensive, but CONGRESS cannot make that a tax which is obnoxious to fundamental conceptions or principles of free government that were known and recognized when the CONSTITUTION was adopted or (what is probably but another way of stating the same thing) which are not within the CONSTITUTIONAL meaning of the words used in conferring the taxing power.

> ". . . it is necessary to add that certain elements are essential in all taxation, and that it will not follow as of course, because the power is so vast,

that everything which may be done under pretense of its exercise will leave the citizen without redress, even though there be no conflict with express constitutional inhibitions. Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government." *Cooley, Constitutional Limitations, 7th Ed., p. 695.*

There is little difficulty in ascertaining how JUDGE COOLEY would have applied the principle thus stated to the instant case. A little farther along, in the same discussion, he said:—

"In the second place, it is of the very essence of taxation that it be levied with equality and uniformity, and to this end, that there should be some system of apportionment. Where the burden is common, there should be common contribution to discharge it." *Ibid, pp. 705-6.*

And, again, quoting with approval from *Woodbridge v. Detroit, 8 Mich. 274, 301*:—

"To compel individuals to contribute money or property to the use of the public, without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is it seems to me, to lay a forced contribution, not a tax, duty, or impost, within the sense of these terms, as applied to the exercise of powers by any enlightened or responsible government." *Ibid, p. 723.*

In BLACK on *American Constitutional Law*, the following appears:—

"But it is not consonant with the Constitutional idea of a tax that it should be exacted from individuals in an arbitrary or discriminating manner. . . . There can be no such thing as valid taxation when the burden is laid without rule, either in respect to the subjects of it, or to the extent to which each must contribute." *3d Ed., p. 442.*

SELIGMAN, who speaks in regard to the history and science of taxation with authority not less than that of any one now living, calls attention to the fact that this concept of equality is embedded even in the etymology of the terms applied in modern usage to the collection of moneys for the support of government. He says:—

"If we look at the various terms applied to what we today call a tax, we shall find every shade of the development reflected not only in the words used in former centuries, but in those still employed today. There are no less than seven different stages in this etymological growth. . . .

"With the seventh and final stage we reach the idea of a *rate* or assessment, fixed or estimated by the governments without any reference to the volition of the taxpayer. We see this in the medieval English *scot* (to be 'at scot and lot'), which is nothing but the German *Schoss* or the Scandinavian *skatt*. It is seen in the German *Schätzung* (or estimate), which was used in the early part of the century. Above all, it is recognized in our *tax* (taxare, to fix, to estimate), the French *taxe*, the Italian *tassa* and the English *rate*." *Edwin R. A. Seligman, Essays in Taxation, 7th Ed., pp. 5-7.*

Professor SELIGMAN also says:

> "The two great canons of justice in taxation are universality and uniformity or equality. If anything has been gained by the revolutions of the Eighteenth century and by the growing public conscience of the Nineteenth, it is a recognition of the fact that all owe a duty to support the state, that a system of wholesale exemptions is iniquitous, and that *all taxpayers should be treated according to the same standard.*" *Ibid, p. 77.*

REDFIELD, in a passage quoted by HON. DAVID A. WELLS, another AMERICAN authority, said:—

> "The very idea of taxation, the very elements of the terms tax—taxation—implies that it is an imposition or levy upon persons or property in due course or order, treating all alike in the same condition and circumstances. The burden of taxation must be equalized by this mode in order to preserve its character." *The Theory and Practice of Taxation, p. 511.*

It seems scarcely necessary to note that in contending that an exaction which operates upon those who are asked to bear its burdens with gross and capricious inequality, such inequality resulting from its computation without regard to any facts which, so far as the beneficiaries are concerned, are other than accidental, remote and of no importance (save as they might affect the amount exacted), is not a tax, in any just or CONSTITUTIONAL sense, there is no attempt to revive any ancient and unfounded theories in regard to the effect of the CONSTITUTIONAL rule that indirect taxes shall be levied uniformly throughout the UNITED STATES. That rule requires merely geographical uniformity. *Knowlton v. Moore, 178 U. S. 41, 106, 108; Flint v. Stone Tracy Co.,*

220 U. S. 107, 158; Billings v. *United States, 232 U. S. 261, 282.*

The instant objection rests upon higher and more fundamental conceptions. These may be said, according to one form of statement, to repose in the very BASIC PRINCIPLES OF FREE AND CONSTITUTIONAL GOVERNMENT or, according to another formula, to be derived from the FUNDAMENTAL MEANING OF THE WORD "TAX," which is conceived *never to mean anything save a levy for public purposes reasonably apportioned according to some rule.* It must be recognized that, in the absence of CONSTITUTIONAL restrictions, the legislative discretion as to the character of the rule of apportionment is almost, if not quite, without limit (*United States* v. *Doremus, 249 U. S. 86, 94*), but it is urged that (1) there must be some *rule* and (2) that the rule must relate to matters of significance to the taxpayer and operate with substantial justice upon the persons and property required by its application to contribute to the support of government. A plan which taxes A in respect to the goods of B, or those of A, B, C and D, is not, it is submitted, such a rule, and it is further urged that the instant proceeding presents the case of such an obnoxious and unjustifiable plan. The view here taken was recommended to this COURT by the late Mr. ATTORNEY GENERAL OLNEY, in his argument in the *Income Tax cases* (*Pollock* v. *Farmers' Loan & Trust Company, supra*). He said that if the word "uniform," as used in the CONSTITUTION, is understood to refer to the nature and quality of a tax, it simply designates a quality inhering in the word "TAX," itself.

> ". . . so far as the validity of this Income Tax law or any other tax law is concerned, the word 'uniform' might as well be out of the Constitution as in it. The word is surplusage. It simply desig-

nates and describes an essential element of every tax—an element which is inherent in every valid tax, and the absence of which would be sufficient to annul any attempted exercise of the taxing power. . . .

"Uniformity between members of a class created for taxable purposes is required upon the same grounds which prevent a purely senseless and capricious division into classes. The classification must be such that it can be referred to some view of public policy. . . .

"Hence, in taxing this class or exempting that, Congress . . . cannot adopt a classification which has no relation to the end to be attained, and is founded only in whim or caprice." *157 U. S. 429. 504-8.*

The principle here invoked runs precisely parallel with that which concludes that a legislative act cannot take the property of one person and confer it upon another person. This rule is universally regarded and has sometimes been said to rest upon fundamental conceptions of justice that must be understood as underlying all CONSTITUTIONAL provisions.

"It seems to be the general opinion, fortified by a strong current of judicial opinion, that, since the American revolution, no State government can be presumed to possess the transcendental sovereignty to take away vested rights of property; to take the property of A and transfer it to B by a mere legislative act. That government can scarcely be deemed to be free where the rights of property are left solely dependent upon a legislative body, without any restraint. The fundamental maxims of free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country

would be warranted in assuming, that . . . such a power, so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority or ought to be implied from any general expression of the will of the people, in the usual forms of the constitutional delegation of power." *Story, Commentaries on the Constitution, 5th Ed., sec. 1399.*

The foregoing should be compared with the views of JUDGE COOLEY who denies the existence of judicial power to declare statutes void because in violation of the fundamental principles of republican government yet reaches precisely the conclusion stated by JUDGE STORY in regard to a legislative enactment attempting to transfer the title to property. The following are extracts from the seventh edition of the "CONSTITUTIONAL LIMITATIONS:"

"If the courts are not at liberty to declare statutes void because of their apparent injustice or impolicy, neither can they do so because they appear to the minds of the judges to violate fundamental principles of republican government, unless it shall be found that those principles are placed beyond legislative encroachment by the constitution." *p. 237.*

"Nor are the courts at liberty to declare an act void, because in their opinion it is opposed to a *spirit* supposed to pervade the constitution, but not expressed in words." *pp. 239-240.*

"It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. Prohibitions are only important where they are in the nature of exceptions to a general grant of power;

and if the authority to do an act has not been granted by the sovereign to its representative, it cannot be necessary to prohibit its being done." *pp. 242-3.*

"But when only the legislative power is delegated to one department, and the judicial to another, it is not important that the one should be expressly forbidden to try causes, or the other to make laws." *p. 243.*

"The bills of rights in the American constitutions forbid that parties shall be deprived of property except by the law of the land; but if the prohibition had been omitted, a legislative enactment to pass one man's property over to another would nevertheless be void. If the act proceeded upon the assumption that such other person was justly entitled to the estate, and therefore it was transferred, it would be void, because judicial in its nature; and if it proceeded without reasons, it would be equally void, as neither legislative nor judicial, but a mere arbitrary fiat." *p. 244.*

"The maxims of Magna Charta and the common law are the interpreters of constitutional grants of power, and those acts which by those maxims the several departments of government are forbidden to do cannot be considered within any grant or apportionment of power which the people in general terms have made to those departments." *p. 244.*

Besides the illustration of a legislative attempt to transfer title to property, JUDGE COOLEY enumerates other things that are never included in a general grant of legislative power. These include,

(1) to take away the right of local self-government,

(2) to make a judge arbiter in his own case, and

(3) to make arbitrary exactions in the guise of taxation.

> "Taxation cannot be arbitrary, because its very definition includes apportionment, nor can it be for a purpose not public, because that would be a contradiction in terms." *p. 243.*

It seems necessary to conclude, therefore, that Judge Cooley would have condemned the exaction here complained of, if considered as a tax in respect of the exercise of the rights of J. Harsen Purdy's legatees under his will, as not made under a legislative act in the sense of the words of the constitutional grant of legislative power to Congress. Furthermore, it appears that he would have condemned this exaction as not a tax within the grant to Congress of the taxing power.

It is not intended, in this brief, to urge any particular classification of this exaction, but rather to show that in every possible classification it is subject to fatal constitutional objections. But much could be said in favor of the classification which would regard the Act of 1916 as attempting to impose a tax in respect of rights to receive beneficial interests, which, if valid, it would diminish. This would raise the question whether a tax in respect of the exercise of rights to receive (*Knowlton* v. *Moore, 178 U. S. 41; Snyder* v. *Bettman, 190 U. S. 249, 254*) and not measured by the value of those rights or anything even remotely related to such value or giving rise to such value, but falling upon such rights and values with gross and capricious inequality could be constitutionally justified. Such an exaction would be subject to all the objections so forcibly enumerated in *Knowlton* v. *Moore*, (*supra, 112-4*). Yet this classification might be

considered to give effect to the practical considerations approved in *Nicol* v. *Ames*, *173 U. S. 509*, as follows:

> "Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, . . ." *173 U. S. 509, 516; quoted with approval, Knowlton v. Moore, 178 U. S. 41, 83.*

It is now for consideration whether, if considered in this practical manner as a tax in respect of rights to receive inheritances and successions, but measured by the value of the whole estate, an unrelated fact, the inequalities hereinbefore illustrated (*supra, 98-111*) would render the exaction UNCONSTITUTIONAL. This is to be determined by considering the nature and scope of the legislative and taxing powers possessed by CONGRESS. This POWER TO TAX is conferred upon CONGRESS by Clause 1, Section 8, Article I, of the CONSTITUTION, in the following terms:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; . . ."

Unless, authority to levy an exaction which must fall unequally, accidentally, capriciously and arbitrarily upon some, while leaving others similarly situated totally free from its burden, is to be found within the foregoing, PLAINTIFFS-IN-ERROR are entitled to a reversal, *or it must be found possible to justify the exaction of which they complain as something else than a tax on income or in respect of the right to receive* by testate or intestate succession.

It has already been noted (*supra, 120-3*) that the LEGISLATIVE POWER is not broad enough to include that which

is not LEGISLATION and that the TAXING POWER, which is a part of the LEGISLATIVE POWER, cannot comprehend the exaction of that which is not a TAX. Nor can the legislature establish its own definition of legislation or by its declaration make that a tax which without such declaration would be a taking of property not justifiable under the taxing power. This must be so, for if CONGRESS could conclusively define the terms in which its powers are delegated every limitation could be defined out of existence and its authority would be absolute.

> "The nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man shall be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the Federal or State legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established." *Calder* v. *Bull, 3 Dall. 386, 388.*

See, also:

Fletcher v. *Peck, 6 Cranch 87, 135-6-143;*
Terrett v. *Taylor, 9 Cranch 43, 50, 52;*
Bank of Columbia v. *Okely, 4 Wheat. 235, 244;*
Wilkinson v. *Leland, 2 Pet. 627, 657;*
Veazie Bank v. *Fenno, 8 Wall. 533, 541;*
Collector v. *Day, 11 Wall. 113, 123-4, 127;*
Ward v. *Maryland, 12 Wall. 418, 427;*
Osborn v. *Nicholson, 13 Wall. 654, 662;*

State Tax on Foreign-Held Bonds, 15 Wall. 300, 320;

Railroad Company v. *Peniston*, 18 Wall. 5, 30;

Citizens' Savings & Loan Association v. *Topeka*, 20 Wall. 655;

Hurtado v. *California*, 110 U. S. 516, 535-6;

Yick Wo v. *Hopkins*, 118 U. S. 356, 369-370, 372-4;

Leever v. *Texas*, 139 U. S. 462, 467-8;

Giozza v. *Tiernan*, 148 U. S. 657, 662;

Scott v. *McNeal*, 154 U. S. 34, 45;

Chicago, Burlington & Quincy Railroad v. *Chicago*, 166 U. S. 226, 235-7;

Holden v. *Hardy*, 169 U. S. 366, 389-390;

Knowlton v. *Moore*, 178 U. S. 41, 76-7, 109-110;

McCray v. *United States*, 195 U. S. 27, 63;

South Carolina v. *United States*, 199 U. S. 437, 448-9, 451;

Ballard v. *Hunter*, 204 U. S. 241, 256;

Evans v. *Gore*, 253 U. S. 245.

The taxing power, as PLAINTIFFS-IN-ERROR respectfully submit, is no more than the power to obtain money (1) for public purposes and (2) by proportionate levies upon the persons or property subjected to taxation. The principle was stated, in the *Income Tax case, supra*, in the concurring opinion of Mr. JUSTICE FIELD, as follows:

> "The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax." *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 599.

The principle that the taxing power is limited by the

content of the verb "to tax" has been frequently asserted and applied. Thus in the *Passenger Cases, 7 How. 283*, it was said:—

> "Nor has Congress power to lay taxes to pay the debts of a State, nor to provide by taxation for its general welfare. Congress may tax for the treasury of the Union and here its power ends." *7 How. 283, 446.*

In *United States* v. *Baltimore & Ohio Railroad, 17 Wall. 322*, one of the reasons assigned for holding that the tax on interest payments was on the bondholder and not collectible in respect of interest due to the City of Baltimore was:—

> "It is not taxation that Government should take from one the profits and gains of another." *17 Wall. 322, 326.*

In *Parkersburg* v. *Brown, 106 U. S. 487*, bonds of a West Virginia municipality were held void because taxation to meet them would not be supported by a public purpose and hence would not be taxation in the constitutional sense. Relying upon *Loan Association* v. *Topeka, 20 Wall. 655*, Mr. Justice Blatchford, for the Court, said:

> "Taxation to pay the bonds in question is not taxation for a public object. It is taxation which takes the private property of one person for the private use of another person." *106 U. S. 487, 501.*

In *Cole* v. *La Grange, 113 U. S. 1*, asserting the same principle, Mr. Justice Gray, speaking for the Court, said:

> "We have been referred to no opposing decision." *113 U. S. 1, 7.*

See, also,

> *Norwood* v. *Baker, 172 U. S. 269, 279, 292;*
> *French* v. *Barber Asphalt Paving Co., 181 U. S. 324, 344;*
> *Wright* v. *Davidson, 181 U. S. 371, 384-5;*
> *Fall Brook Irrigation District* v. *Bradley,* 164 *U. S. 112, 158, 176-7;*
> *Connolly* v. *Union Sewer Pipe Company, 184 U. S. 540, 563;*
> *Green* v. *Frazier, 253 U. S. 233, 238-9.*

That the word "tax" implies a practical and substantial degree of equality among the persons and property taxed might probably be deduced from the fundamental nature and principles of government as recognized and applied by all free peoples.

> "The equality of the rights of citizens is a principle of republicanism. Every republican government is bound in duty to protect all its citizens in the enjoyment of this principle, if within its power." *United States* v. *Cruikshank, 92 U. S. 542, 555.*

Moreover, this principle of inherent equality is well established by the decisions of this COURT. Thus, MR. JUSTICE BREWER, speaking for this COURT, *in Patton* v. *Brady, 184 U. S. 608,* quoted JUDGE COOLEY (*Cooley on Taxation, p. 1*) in order to define taxes as—

> "The enforced *proportional* contribution of persons and property, levied by the authority of the State for the support of the government and for all public needs." *184 U. S. 608, 619.*

In *McMillen* v. *Anderson, 95 U. S. 37,* sustaining a license tax imposed by the STATE OF LOUISIANA, MR. JUS-

TICE MILLER, who delivered the opinion of this COURT, stated this rule of equality of burden as follows:

> "The mode of assessing taxes in the States by the Federal government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary, or unequal or illegal. It must, under our Constitution, be lawfully done." *95 U. S. 37, 41.*

In *United States* v. *Singer, 15 Wall. 111,* which was a suit to enforce a distiller's bond under the Act of CONGRESS of July 20, 1868, the rule was again asserted in connection with FEDERAL taxation and it was declared to mean, in substance, that those equally situated must bear practically equal shares of the public burdens.

> "The tax here is uniform in its operation; that is, it is assessed equally upon all manufacturers of spirits wherever they are. The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike." *15 Wall. 111,*

See, also:—

Cummings v. *National Bank, 101 U. S. 153, 157;*
Hager v. *Reclamation District, 111 U. S. 701, 705;*
Barbier v. *Connolly, 113 U. S. 27;*
Soon Hing v. *Crowley, 113 U. S. 703;*
Kentucky Railroad Tax Cases, 115 U. S. 321, 337;
Missouri Pacific Railway v. *Humes, 115 U. S. 512, 523;*
Royall v. *Virginia, 116 U. S. 572, 580;*
Hayes v. *Missouri, 120 U. S. 68;*

Pacific Express Company v. *Seibert, 142 U. S. 339, 351, 354;*

McHenry v. *Alford, 168 U. S. 651, 666;*

Magoun v. *Illinois Trust & Savings Bank, 170 U. S. 283, 293-4, 300;*

Norwood v. *Baker, 172 U. S. 269, 292;*

Nicol v. *Ames, 173 U. S. 509, 522;*

Cotting v. *Kansas City Stock Yards Company, 183 U. S. 79, 112;*

Florida Central & Peninsular Railroad Company v. *Reynolds, 183 U. S. 471, 477-8;*

Armour Packing Company v. *Lacy, 200 U. S. 226, 236;*

Hatch v. *Reardon, 204 U. S. 152, 159-160;*

Travis v. *Yale & Towne Manufacturing Company, 232 U. S. 60, 77-8;*

United States v. *Doremus, 249 U. S. 86, 94.*

While some of the foregoing references are cases involving the FOURTEENTH AMENDMENT it must be borne in mind that infringement of that AMENDMENT would, in its absence, be infringement of fundamental rights.

> "It should be kept in mind that the laws of a State come under the prohibition of the Fourteenth Amendment only when they infringe fundamental rights." *Ballard* v. *Hunter, 204 U. S. 241, 262.*

Governmental acts which are arbitrary, oppressive or unjust are, moreover, denials of due process of law (*Davidson* v. *New Orleans, 96 U. S. 97, 107-8; Hager* v. *Reclamation District, 111 U. S. 701, 707; Twining* v. *New Jersey, 211 U. S. 78, 100-1; Ballard* v. *Hunter, 204 U. S. 241, 255-6*) and as effectively prohibited to the FEDERAL government by the FIFTH AMENDMENT as to the STATES

by the FOURTEENTH AMENDMENT. Scarcely, however, can this prohibition have been necessary. It would be difficult to conclude, upon any process of reasoning, that a government which is one of enumerated powers, powers that must always be found within the words of an express delegation or in some necessary implication, could be held to possess arbitrary power to violate fundamental rights. It would apparently be impossible to construe any portion of a written CONSTITUTION, ordained by the people, as conveying power to destroy such rights.

There is nothing among the capricious inequalities of the Act now under examination which suggests permissible classification or, indeed, classification of any character. One of the essentials of valid classification is that it shall operate alike on all persons in similar circumstances (*Kentucky Railroad Tax Cases, 115 U. S. 321, 337*). There must be neither clear and hostile discrimination against particular persons or classes (*Bell's Gap Railroad* v. *Pennsylvania, 134 U. S. 232, 237*) nor differences and distinctions which bear no just or reasonable relation to the purpose for which classification is attempted (*Gulf, Colorado & Santa Fe Railway* v. *Ellis, 165 U. S. 150, 155*).

> "The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural." *Nicol* v. *Ames, 173 U. S. 509, 521.*

A merely capricious basis of classification is not permitted.

> "Of course, if such discrimination were purely arbitrary, oppressive or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations or other con-

siderations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism and a denial of the equal protection of the laws to the less favored classes." *American Sugar Refining Company* v. *Louisiana*, *179 U. S. 89, 92.*

Although the foregoing was said in a case arising under the FOURTEENTH AMENDMENT it is certain that the restrictions on the STATES of that amendment are no more rigid, in respect of taxation, than those of the FIFTH AMENDMENT upon the FEDERAL government (*French* v. *Barber Asphalt Paving Co.*, *181 U. S. 324, 329.*)

See, also:

Pacific Express Company v. *Siebert*, *142 U. S. 339;*
Leeper v. *Texas*, *139 U. S. 462;*
Giozza v. *Tiernan*, *148 U. S. 657, 662;*
McHenry v. *Alford*, *168 U. S. 651, 666;*
Nicol v. *Ames*, *173 U. S. 509, 520-1;*
Clark v. *Kansas City*, *176 U. S. 114, 119;*
Florida Central & Peninsular Railroad v. *Reynolds*, *183 U. S. 471, 477;*
Connolly v. *Union Sewer Pipe Co.*, *184 U. S. 540, 559-561, 566;*
Billings v. *Illinois*, *188 U. S. 97, 101-2;*
McCray v. *United States*, *195 U. S. 61-2.*
District of Columbia v. *Brooke*, *214 U. S. 138, 150-1;*
Southern Railway v. *Greene*, *216 U. S. 400, 417;*
Griffith v. *Connecticut*, *218 U. S. 563, 569;*
Lindsley v. *Natural Carbonic Gas Company*, *220 U. S. 61, 78-9;*
Flint v. *Stone Tracy Company*, *220 U. S. 107, 174;*

Keeney v. *New York*, *222 U. S. 525, 536;*
Second Employers' Liability Cases, *223 U. S. 1, 53;*
Quong Wing v. *Kirkendall*, *223 U. S. 59, 62;*
Rosenthal v. *New York*, *226 U. S. 260, 270;*
Metropolis Theatre Co. v. *Chicago*, *228 U. S. 61, 69, 70;*
Barrett v. *Indiana*, *229 U. S. 26, 29-30;*
Billings v. *United States*, *232 U. S. 261, 283;*
International Harvester Company v. *Missouri*, *234 U. S. 199, 215;*
Mount St. Mary's Cemetery Association v. *Mullins*, *248 U. S. 501, 506;*
Withnell v. *Ruecking Construction Co.*, *249 U. S. 63, 71;*
United States v. *Doremus*, *249 U. S. 86, 94;*
Dominion Hotel v. *Arizona*, *249 U. S. 265;*
Chalker v. *Birmingham & Northwestern Railway Co.*, *249 U. S. 522, 527;*
Mackay Telegraph Co. v. *Little Rock*, *250 U. S. 94, 100;*
Maxwell v. *Bugbee*, *250 U. S. 525, 541-3;*
Branson v. *Bush*, *251 U. S. 182, 189-190;*
Shaffer v. *Carter*, *252 U. S. 37, 58;*
Goldsmith v. *Prendergast*, *252 U. S. 12, 17-8.*

In *Royster Guano Co.* v. *Virginia*, *253 U. S. 412*, decided on June 7, 1920, a tax sought to be imposed by the COMMONWEALTH OF VIRGINIA was condemned because of unreasonable classification. Mr. JUSTICE PITNEY, for the majority of this COURT, saying, in part:—

"It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to

be accomplished by the legislation." *253 U. S. 412, 416.*

And, in the same decision, it was noted that the fact that the inequality was accidental or inadvertent would not affect the CONSTITUTIONAL question. The sentence immediately following that above quoted is:—

> "It follows that it is arbitrary in effect; and none the less because it is probable that the unequal operation of the taxing system was due to inadvertence rather than design." *253 U. S. 412, 416.*

In *Gast Realty and Investment Co.* v. *Schneider Granite Company, 240 U. S. 55*, a local assessment for street-paving was declared void on account of inequalities, the COURT, by MR. JUSTICE HOLMES, referring to *Hauck* v. *Little River Drainage District, 239 U. S. 254, 262*, and *Martin* v. *District of Columbia, 205 U. S. 135, 139*, and saying:—

> "But . . . if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred the law cannot stand against the complaint of one so taxed in fact." *240 U. S. 55, 58-9.*

The following, from the same opinion, might well be applied to the illustrations of inequalities under the exaction here under scrutiny which have been given (*supra, 98-111*).

> "The differences were not based upon any consideration of difference in the benefits conferred but were established mechanically . . . The . . . case is not an incidental result of a rule that as a

whole and on the average may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout. It is enough to say that the ordinance . . . is bad upon its face as distributing a local tax in grossly unequal proportions not because of special considerations applicable to the parcels taxed but in blind obedience to a rule that requires the result." *240 U. S. 55, 59.*

The effect of such inequalities as those disclosed by the illustrations (*supra, 98-111*) would seem to have been determined in *Brushaber* v. *Union Pacific Railroad, 240 U. S. 1,* in which Mr. CHIEF JUSTICE WHITE, for the COURT, said:—

"And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property; that is a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as inevitably to lead to the same conclusion." *240 U. S. 1, 24-5.*

These principles are strongly supported by decisions of the STATE courts.

French v. *Teschemaker, 24 Calif. 544;*
Miller v. *Kister, 68 Calif. 142, 145;*
Booth v. *Town of Woodbury, 32 Conn. 118, 130;*
Herriott v. *Potter, 115 Iowa 648, 652;*
Atchison, Topeka & Santa Fe Ry. v. *Clark, 60 Kans. 826, 830;*

Sutton's Heirs v. *City of Louisville*, 5 *Dana* (*Ky.*) 28, 31;
City of Lexington v. *McQuillan's Heirs*, 9 *Dana* (*Ky.*) 513, 516-8;
Cheaney v. *Hooser*, 9 *B. Mon.* (*Ky.*) 330, 344-6;
New Orleans Coal & Banking Co. v. *New Orleans*, 30 *La. Ann.* 1371, 1375;
Commonwealth v. *Peoples' Five Cents Savings Bank*, 5 *Allen* (*Mass.*) 428, 437;
Freeland v. *Hastings*, 10 *Allen* (*Mass.*) 570, 580;
Oliver v. *Washington Mills*, 11 *Allen* (*Mass.*) 268, 279;
Portland Bank v. *Apthorp*, 12 *Mass.* 252, 258;
Cheshire v. *County Commissioners*, 118 *Mass.* 386, 389;
Woodbridge v. *Detroit*, 8 *Mich.* 274, 291, 294-6, 301-2, 305-6, 309;
Ryerson v. *Utley*, 16 *Mich.* 269, 276;
People v. *Township of Salem*, 20 *Mich.* 452, 473-4;
Callam v. *City of Saginaw*, 50 *Mich.* 7, 9;
Sanborn v. *Rice County*, 9 *Minn.* 273, 278-9;
State v. *Bazille*, 97 *Minn.* 11, 17;
Town of Macon v. *Patty*, 57 *Miss.* 378, 406-7;
Deal v. *Mississippi County*, 107 *Mo.* 464, 471;
State v. *Loomis*, 115 *Mo.* 307, 313-5;
State v. *Julow*, 129 *Mo.* 163, 177;
Magneau v. *Fremont*, 30 *Nebr.* 843, 854;
State v. *Express Company*, 60 *N. H.* 219, 251-2, 255;
Thompson v. *Kidder*, 74 *N. H.* 89, 91-2, 96;
State v. *Township Committee*, 36 *N. J. L.* 66, 69-70;
State v. *Newark*, 37 *N. J. L.* 415, 423;
State v. *Hammer*, 42 *N. J. L.* 435, 440;

Maxwell v. *Edwards*, 89 *N. J. L.* 446, 448, 451;
Tidewater Company v. *Coster*, 18 *N. J. Eq.* 518, 527-8;
People v. *Mayor, &c. of Brooklyn*, 4 *N. Y.* 419, 424;
Stuart v. *Palmer*, 74 *N. Y.* 183, 188-190;
People v. *Pitt*, 169 *N. Y.* 521, 528;
Matter of Pell, 171 *N. Y.* 48, 57-60;
People v. *Reardon*, 184 *N. Y.* 431, 445;
People v. *Ronner*, 185 *N. Y.* 285, 291, 293;
People v. *Mensching*, 187 *N. Y.* 8, 16, 21;
Matter of Keeney, 194 *N. Y.* 281, 286; *affirmed*, 222 *U. S.* 525;
Puitt v. *Commissioners*, 94 *N. C.* 709, 718;
Scovill v. *Cleveland*, 1 *O. St.* 126, 135-6;
De Bolt v. *Ohio Life Insurance & Trust Company*, 1 *O. St.* 563, 581;
Northern Indiana Railroad v. *Connelly*, 10 *O. St.* 159, 165;
Ellis v. *Frazier*, 38 *Oreg.* 462, 470-1;
Bank of Pennsylvania v. *Commonwealth*, 19 *Pa. St.* 144, 152;
Sharpless v. *Mayor of Philadelphia*, 21 *Pa. St.* 147, 167-8;
Philadelphia Association v. *Wood*, 39 *Pa. St.* 73;
Tyson v. *School Directors*, 51 *Pa. St.* 9, 21-2;
Durach's Appeal, 62 *Pa. St.* 491, 494;
Hammett v. *Philadelphia*, 65 *Pa. St.* 146, 151, 153;
Washington Avenue, 69 *Pa. St.* 352;
Appeal of Fox and Wife, 112 *Pa. St.* 337, 352-3;
Allegheny City v. *West Penna. R. R. Co.*, 138 *Pa. St.* 375, 383;
Pittsburgh's Petition, 138 *Pa. St.* 401, 434;
Morewood Avenue, 159 *Pa. St.* 20, 36;

Cope's Estate, 191 Pa. St. 1, 22;
In re McKennan's Estate, 25 So. Dak. 369, 384;
Stratton's Claimants v. *Morris' Claimants, 89 Tenn. 497, 541-2;*
Allen v. *Drew, 44 Vt. 174, 188;*
Richmond & Allegheny Railroad v. *City of Lynchburg, 81 Va. 473, 478-9;*
Beals v. *State, 139 Wis. 544, 553.*

STATE death duties which were similarly unequal have been judicially condemned for the reasons above urged. Thus in *State* v. *Ferris, 53 Ohio St. 314,* although the SUPREME COURT OF OHIO expressly asserted the power of the Legislature to impose such taxes (*53 Ohio St. 314, 325*), it was held that there was no power to fix an exemption of $20,000, with reference to the whole estate of the decedent; imposing taxes in respect of successions, however small, out of estates in excess of $20,000, and exempting all successions arising out of estates of less than $20,000. The COURT said:—

> ". . . the value of the right to receive is in direct proportion to the value of the property received, and must under the constitution be taxed accordingly, if taxed at all." *53 Ohio St. 314, 339.*

A similar statute was condemned by the SUPREME COURT OF WISCONSIN, in *Black* v. *State, 113 Wis. 205,* decided in 1902. The following is quoted:

> "Here is unlawful discrimination, pure and simple. No rational distinction or difference can be drawn between the two legatees simply because the estates from which their legacies come are of slightly different size." *113 Wis. 205, 222.*

See, also:—

Friend v. *Levy, 76 O. St. 26;*

Curry v. *Spencer*, *61 N. H. 624;*
State v. *Switzler*, *143 Mo. 287, 327, 329-331;*
Cope's Estate, *191 Pa. St. 1, 20-1;*
State v. *Bayille*, *87 Minn. 500, 502-4;*
Drew v. *Tifft*, *79, Minn. 175, 186-7;*
State v. *Gorman*, *40 Minn. 232, 235.*

PLAINTIFFS-IN-ERROR respectfully submit that the exaction of which they complain cannot be sustained as a tax in respect of the exercise of rights to receive by testate or intestate succession.

SEVENTH.

If the exaction complained of is a tax it must be a direct tax and unconstitutional because not apportioned according to population.

1. It lacks the essential characteristics of an excise tax as it affects the estate of every decedent, does not rest upon any right or privilege and the demand is absolute and unavoidable (Infra, 142).

2. It is a tax upon property by reason of its ownership (Infra, 151).

3. The words "the transfer of" in the phrase "is hereby imposed upon the transfer of the net estate of every decedent" have no practical effect and cannot overcome the actual character of the exaction (Infra, 162).

4. It would be void if it were a capitation tax (Infra, 168).

THE FAMILIAR CONSTITUTIONAL PROVISIONS which are invoked at this point are to be regarded rather as regulations prescribing the manner in which the plenary FEDERAL power of taxation is to be exerted than as limita-

tions upon the complete and all-embracing authority to tax. *Brushaber* v. *Union Pacific, 240 U. S. 1, 13; Veazie Bank* v. *Fenno, 8 Wall. 533, 541.*

They are:

> "Representatives and direct taxes shall be apportioned among the several States . . . according to their respective numbers, . . ." *Article 1, Section 2, 3d Clause.*

And:

> "No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." *Article 1, Section 9, 4th Clause.*

The power thus regulated is conferred upon CONGRESS by Article I, Section 8, Clause 1, and is as follows:

> "To lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defense and general welfare of the United States; . . ."

This clause confers no power not embraced within the meaning of the words "TAXES" and "TAXATION," as they were understood when the CONSTITUTION was adopted:

> *State Tonnage Tax Cases, 12 Wall. 204, 215;*
> *State Tax on Foreign-Held Bonds, 15 Wall. 300, 319;*
> *Pollock* v. *Farmers' Loan & Trust Co., 157 U. S. 429, 557;*
> *Thomas* v. *United States, 192 U. S. 363, 369-370;*
> *Hawke* v. *Smith, No. 1, 253 U. S. 221, 227.*

The purpose and meaning of the regulation requiring apportionment of direct taxes have received definition

and the question asked by RUFUS KING in the CONSTITUTIONAL CONVENTION, and then without response (*Veazie Bank* v. *Fenno, 8 Wall. 533, 544*), has been broadly answered.

> ". . . in *Pollock* v. *Farmers' Loan and Trust Co., 157 U. S. 429; 158 U. S. 601*, the Court, . . . held the law to be unconstitutional in substance for these reasons: Concluding that the classification of direct was adopted for the purpose of rendering it impossible to burden by taxation accumulations of property, real or personal, except subject to the regulation of apportionment, it was held that the duty existed to fix what was a direct tax in the Constitutional sense so as to accomplish this purpose contemplated by the Constitution (*157 U. S. 581*) . . ." *Brushaber* v. *Union Pacific Railroad, 240 U. S. 1, 16.*

> ". . . the Amendment contains nothing repudiating or challenging the ruling in the *Pollock Case* that the word direct had a broader significance since it embraced also taxes levied directly on personal property because of its ownership, and therefore the Amendment at least impliedly makes such wider significance a part of the Constitution. . . ." *Brushaber* v. *Union Pacific R. R. 240 U. S. 1, 19.*

That the interpretation rendered in the *Pollock Case*, *supra*, derived additional sanction by the adoption of the SIXTEENTH AMENDMENT; See, *Eisner* v. *Macomber, 252 U. S. 189, 205-6.*

It would seem, therefore, that no basis can now exist for doubt that the term "direct taxes," as used in the CONSTITUTION, embraces every exaction that rests upon the fact of ownership of real or personal property as distinguished from a tax dependent upon the active use of

property, the term "active use" not indicating the merely passive consequence of ownership but rather the exercise of some right or privilege (*infra, 142-162*).

> ". . . inherently there is this fundamental difference . . . since *the privilege of use is purely passive* (or subjective),—a right which necessarily pertains to ownership *and must exist where there is ownership*, as one may not obtain ownership without acquiring the privileges of use which ownership gives. The other, on the contrary, . . . although it arises from ownership, is *active* (objective); that is, it is *the outward and distinct exercise of a right* which ownership confers, but which would not necessarily be exerted by the mere fact of ownership." *Billings* v. *United States, 232 U. S. 261, 281.*

The significance of the foregoing is conceived to be that the mere *privilege of use* (passive and subjective) may not be the subject of an excise tax (which would in substance attach to the property by reason of its ownership and therefore would be a direct tax and require apportionment), while the *exercise of the privilege of use* (active and objective) may be made the subject of a CONSTITUTIONAL excise, or indirect tax.

> *Nicol* v. *Ames, 173 U. S. 509, 519, 521;*
> *Thomas* v. *United States, 192 U. S. 363, 371;*
> *Flint* v. *Stone Tracy Company, 220 U. S. 107;*
> *Pierce* v. *United States, 230 U. S. 290, 291;*
> *Knowlton* v. *Moore, 178 U. S. 41, 59.*

Seventh.—1. The exaction lacks the essential characteristics of an excise tax as it affects the estate of every decedent; it does not rest upon any right or privilege, and the demand is absolute and unavoidable.

It is conceived that excise taxes are never, in the final analysis, compulsory.

> "A tax is obligatory; from it there is no escape. An excise is voluntary; the purchaser who would pay it cannot be compelled to purchase." *South Carolina* v. *United States, 39 Ct. Cls. 257, 286; affirmed 199 U. S. 437.*

In other words, no one ever finds himself in the situation which involves liability to pay an excise tax until he has voluntarily determined to exercise some right or privilege which entails such liability. Thus no one was required to pay the Federal corporation tax of August 5, 1909 (*36 Stat. 6, 11*), sustained in *Flint* v. *Stone Tracy Company, 220 U. S. 107*, except those who *voluntarily acquired the form of a private corporation and having assumed that form actually engaged in business as a corporation;* the stamp tax on sales upon a board of trade (*30 Stat. 448*), sustained in *Nicol* v. *Ames, 173 U. S. 509*, was required of no one who did not choose to *take advantage of the facilities offered by such boards;* the legacy tax sustained in *Knowlton* v. *Moore, 178 U. S. 41*, was paid only *when the privilege of receiving was exercised* and could be avoided by renouncing; the tax on ownership and use of foreign-built yachts, imposed by the Tariff Act of 1909, was not incurred by mere right to use, which always followed ownership, but only by *the exercise* of that right (*Billings* v. *United States, 232 U. S. 261, 280-1*). Indeed, in *McCoach* v. *Minehill & Schuylkill Haven Railroad, 228 U. S. 295*, a case in which the Corporation Tax of 1909 was held not to be due, because the corporation was not engaged in business, it was strongly intimated that if the "mere receipt of income from the property leased" by the company which was held to be entitled to recover what it had paid, could be held to bring a corporation within the purview of the taxing

act, the law would be obnoxious to the CONSTITUTIONAL objections sustained in the Income Tax cases (*Pollock* v. *Farmers' Loan & Trust Co., supra*).

> "In our opinion the mere receipt of income from the property leased (the property being used in business by the lessee, and not by the lessor) and the receipt of interest and dividends from invested funds, bank balances, and the like and the distribution thereof among the stockholders of the *Minehill Company*, amount to no more than receiving the ordinary fruits that arise from the ownership of property. The ground of decision in the *Pollock Case* was that a tax upon income received from real estate and invested personal property (as distinguished from the transaction of business) was in effect a direct tax upon the property itself, and therefore invalid unless apportioned according to population." *228 U. S. 295, 306.*

The precise point is suggested by one of Franklin's shrewd observations.

> ". . . in walking thro' the Strand and Fleet streets one morning at seven o'clock I observ'd there was not one shop open, tho' it had been daylight and the sun up above three hours; the inhabitants of London chusing voluntarily to live much by candle-light and sleep by sunshine and yet often complain, a little absurdly, of the duty on candles and the high price of tallow.*" *Autobiography, Federal Ed., pp. 253-4.*

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*Cassanova affords a similar passage: "Quand il ne s'agit que d'un transit, si 'on fait passer, on paye; si l'on ne fait point passer, et rien n'y oblige, on ne doit rien; et nul n'a le droit de se plaindre qu'un Etat ou meme qu'un simple particulier prenne telle voie plutot que telle autre." *Memoirs de Cassanova, Garnier Freres' Ed., Paris, 1910, Vol. 8, p. 376.* (When only a transit is concerned, if one causes anything to pass, one pays; if one causes nothing to pass, and there is no compulsion, one owes nothing; and none has the right to complain that a state or even an individual takes one route rather than another).

Alexander Hamilton, in the twenty-first number of The Federalist expresses the same thought as follows:—

> "Imposts, excises, and, in general, all duties upon articles of consumption, may be compared to a fluid, which will, in time, find its level with the means of paying them. The amount to be paid by each citizen will in a degree be at his own option, and can be regulated by an attention to his resources."

The exercise of this option, and thus voluntarily entering the taxable class by *exercising the privilege* of selling on a board of trade, was expressly made the ground of decision, and the means of distinction between direct and indirect taxes in *Nicol* v. *Ames, supra.*

> "We think the tax is in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the Act." *173 U. S. 509, 519.*

That the tax referred to in the foregoing was on the *exercise of the privilege* rather than on the *passive holding of title to the privilege* is apparent from the fact that it was measured by the *active use, i. e.,* by the actual sales. Just as there could be no receipt of a legacy or share (*Knowlton* v. *Moore, 178 U. S. 41*) without *exercise of the privilege of receiving,* so there could be no sale on the exchange without *exercise of the privilege* of selling there. Nothing compelled to such exercise in either case. If the taxable situation was produced, it was voluntarily produced. Again, in the decision last quoted, observing that a tax on all sales, wherever made, would be a tax upon the property sold, *i. e.,* a direct tax, it was said:

> "In order to tax it the privilege or facility must exist in fact, but it is not necessary that it should

be created by the government. . . . A tax upon the privilege of selling property at the exchange and of thus *using* the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property." *173 U. S. 509, 521.*

The last two sentences of the foregoing were quoted with approval in *Fairbank* v. *United States, 181 U. S. 283, 293.*

To similar effect is the decision in *Thomas* v. *United States, 192 U. S. 363,* which involved the CONSTITUTIONALITY of a stamp tax (*Act of June 13, 1898; 30 Stat. 448*) in respect of shares of corporate stock sold by one doing business as a broker. Holding the tax to be valid, as an excise, the COURT said:—

"The sale of stocks is a particular business transaction in the *exercise of the privilege* afforded by the laws in respect to corporations of disposing of property in the form of certificates. The stamp duty is *contingent on the happening of the event of sale,* and *the element of absolute and unavoidable demand is lacking.*" *192 U. S. 363, 371.*

The foregoing was referred to in *Flint* v. *Stone Tracy Company, 220 U. S. 107,* the *Corporation Tax case,* and the same principle of a voluntarily assumed and avoidable tax imposed in respect of *the exercise of a privilege* was applied.

". . . the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax measured by the standard prescribed. The difference between the acts is not merely nominal, but

rests upon substantial differences between the mere ownership of property and the actual doing of business in a certain way." *220 U. S. 107, 150.*

And, again:—

"The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, *i. e.*, with the advantages which arise from corporate or quasi-corporate organization; or when applied to insurance companies, for doing the business of such companies. As was said in the *Thomas case, 192 U. S. 363, supra,* the requirement to pay such taxes involves *the exercise of privileges,* and *the element of absolute and unavoidable demand is lacking.* If business is not done in the manner described in the statute, no tax is payable." *220 U. S. 107, 151-2.* (*See, also, pp. 161-2*).

In *McCoach* v. *Minehill & Schuylkill Haven Railway, 228 U. S. 295,* it was made clear that, under the *Corporation Tax* law of 1909, there was no tax unless the privilege was actually exercised and also that the privilege, to be taxable, must be something more than one of the common incidents of ownership of property (*supra, 144*).

In the first decision in *Pollock* v. *Farmers' Loan & Trust Company, 157 U. S. 429,* the criterion of optional avoidance was stated as an alternative to that of shifting, Mr. Chief Justice Fuller for the majority of the Court saying:—

"Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are *under no legal compulsion to pay them,* are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or

personal, . . . and the payment of which cannot be avoided, are direct taxes." *157 U. S. 429, 558.*

So, too, in *Flint* v. *Stone Tracy Co., 220 U. S. 107*, it was said, adopting words of JUDGE COOLEY:

> "Excises are 'taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.' *Cooley, Const. Lim., 7th Ed., 680.*" *220 U. S. 107, 151.*

The principle is very effectively illustrated by the four cases involving the tax on the use of foreign-built yachts provided for by Section 37 of the TARIFF ACT OF 1909 (*36 Stat. 112*), *Billings* v. *United States, 232 U. S. 261; Pierce* v. *United States, 232 U. S. 290; United States* v. *Goelet, 232 U. S. 293*, and *United States* v. *Bennet, 232 U. S. 299.* In the first of these cases, BILLINGS, who owned and used a yacht of the class intended by the statute, was sued for the amount of the tax and defended, attacking its CONSTITUTIONALITY. The decision sustaining the right to collect seems squarely to rest upon *the distinction between a tax in respect of ownership and one in respect of use.* In this case, MR. JUSTICE WHITE, who spoke for the COURT in all the four cases, said:—

> ". . . it is not ownership but *the election during the taxing period* of the owner to take advantage of one of the elements which are involved in ownership, the right to use, which is the subject upon which the statute places the excise duty." *232 U. S. 261, 280.*

The opinion then proceeds to distinguish between that passive significance of "use" which expresses the mere privilege to use, and that other and active sense, in

which it appeared that the word was intended in the taxing Act, that implies actual *exercise of such privilege.*

> ". . . the privilege of use is purely passive (or subjective), a right which necessarily pertains to ownership, and must exist where there is ownership, as one may not obtain ownership without acquiring the privileges of use which ownership gives. The other, on the contrary, that is, use in the statutory sense, although it arises from ownership, is active (objective), that is, it is the outward and distinct *exercise of a right* which ownership confers but which would not necessarily be exerted by the mere fact of ownership." *232 U. S. 261, 281.*

The distinction thus stated was described as "fundamental" (*p. 281*). In the second case, the owner of a foreign-built yacht was held not liable to the tax because—

> ". . . the yacht . . . was not in use . . . during the year . . . but was out of commission and laid up unused . . . throughout the whole of such year." *Pierce* v. *United States, 232 U. S. 290, 291.*

See, also:

Scholey v. *Rew, 23 Wall. 331;*
Ashley v. *Ryan, 153 U. S. 436, 441, 446;*
Patton v. *Brady, 184 U. S. 608, 617-8;*
Spreckels Sugar Refining Co. v. *McClain, 192 U. S. 397, 441-3;*
Eliot v. *Freeman, 220 U. S. 178, 187;*
McCoach v. *Minehill & Schuylkill Haven Ry. Co., 228 U. S. 295, 305;*
United States v. *Whitridge, 231 U. S. 144, 147;*
Anderson v. *Forty-two Broadway Co., 239 U. S. 69, 72.*

Applying this principle to the case at bar, it seems impossible to find in the present exaction any dependence upon privilege or exercise of privilege or right or any option of avoidance. In other words the "element of absolute and unavoidable demand" is not lacking. On the contrary, *if the exaction is valid, imperative and inescapable demand is unmistakably present.* Absolute and unavoidable demand is the very essence of the Act. It seems unquestionable that, if the statute is enforceable at all, *only two elements are necessary to establish the right of the government to collect the tax and they are (1) the ownership of property and (2) death.*

The statute has been so interpreted and applied. Attention has already been directed (*supra, 28*) to the regulation promulgated by the Commissioner of Internal Revenue which asserts that the tax is enforceable even though the property "escheats to the State for lack of heirs." (*Internal Revenue Regulations 37; Revised, 1919; Article 1*).

The Commissioner has also ruled, with the approval of the Secretary of the Treasury, that the tax applies, subject to the exemption, to the estate of *every decedent.*

> "The tax is imposed in the case of the estate of 'every decedent,' although by reason of an exemption, the net estate of a resident decedent, in order to be taxable, must exceed $50,000. . . ." *Internal Revenue Regulations 37; Revised, 1919; Article 4: Repeated in the revision of January, 1921.*

And doing away, in an eminently practical manner, *which does no violence to the terms of the statute,* with every shred of suggestion that a decedent might have

property of taxable amount and such ownership fail to result in taxation, another ruling declares that:—

> "The practical test of the existence of a taxable transfer is whether the statute directs that the property in question be included in the gross estate." *Internal Revenue Regulations 37; Revised 1919; Article 2; Repeated in the revision of January, 1921.*

It would be difficult to reconcile any different interpretations with the language of the Act, yet it must be that a tax which is applied to the estate of every decedent, even though that estate escheats for lack of heirs, regardless of testamentary disposition or distribution by authority of intestate laws, the ownership of property and death constituting the only facts necessary to its application, is a direct tax upon property by reason of its ownership. Certainly, *if excise taxes must rest upon the exercise of some privilege and may not make an imperative and unavoidable demand*, this exaction comes not within the definition. That the particular ownership may cease by the death of the immediate owner is surely an universal incident of ownership. THUS, THE DEMAND FOR THE "TAX" IS MADE AS IMPERATIVE AS DEATH.

Seventh.—2. The exaction is a tax upon property by reason of its ownership.

THE OWNER OF PROPERTY NEED NOT ACT, in any way, in order to incur liability to this "tax," if it is a "tax" and valid. The plain words of the Act make it depend not upon the owner's action or omission to act, but wholly upon ownership and death. On the other hand, there is nothing which the owner of property can do that would avoid such liability—*if he remains the owner of the property, the inevitable event of death will enforce the tax.*

Moreover, without the ownership of property it is impossible that there should be any liability for this "tax." It would seem strange, indeed, if a "tax" which *necessarily results from mere ownership and can never result in the absence of ownership*, measured moreover by the net value of all property owned, should be classed as anything else than a tax on the property owned, by reason of the ownership.

The learned DISTRICT JUDGE who rendered the decision below seems unquestionably to have erred when he suggested that the "tax" is—

> "on the right of decedent to have the estate pass by will or intestacy." *R. 11; 263 Fed. 620, 621.*

Doubtless such a right exists in every STATE in the UNION, but—

1. There is no reference to any such right in the statute purporting to authorize this exaction, and

2. If any FEDERAL tax could CONSTITUTIONALLY be imposed at all in respect of this right, it must depend, not upon the right, as a right, but *upon its use or exercise* by a possessor of the right, *i. e., one whose interest in property ceased by reason of death.*

The words of the statute (*Section 201*), however, apply the tax *to the estate of every decedent* without qualification. There is no restriction, to estates of those entitled to transmit by testate or intestate succession; or to those portions of estates which STATE law may permit to be transmitted in that way; or to property in connection with which there has been an exercise by the decedent, or any one else, of any right or privilege whatsoever. The COMMISSIONER OF INTERNAL REVENUE has ruled, with the approval of the SECRETARY OF THE TREAS-

URY, that the *ownership of property is the sole test* (*supra, 151*) and that the tax applies *even though the property escheats* to the STATE for want of heirs or next of kin (*supra, 28*). To write into the statute words necessary to restrict its operation to property as to which the right exists "to have the estate pass by will or intestacy" (*supra, 152*) would be *to make a new Act*, different from that which CONGRESS intended and, whether such an addition would or would not make a valid statute, to make it would be beyond the purview of judicial power.

In fact, there are now few STATES which permit the whole net estate of any decedent, save those whose possessions make up but the smallest aggregates, to pass in accordance with a will or to the heirs and next of kin. Most STATES, like the STATE OF NEW YORK, limit the right to transmit to a portion of the estate.

> "The effect of this special tax is to take from the property a portion, or a percentage of it, for the use of the State, . . ." *Matter of Swift, 137 N. Y. 77, 85; quoted United States* v. *Perkins, 163 U. S. 625, 629.*

The subtraction from the estate of the State death duty or transfer tax occurs prior to the passing to the beneficiary (else the excision could not be sustained in respect of a legacy to the UNITED STATES, as it was in *United States* v. *Perkins, supra*), and is, therefore, *pro tanto* a denial of the right or privilege to transmit.

> "The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the Legislature assents to a bequest of it." *United States* v. *Perkins, 163 U. S. 625, 630.*

The exaction presently under consideration, therefore, has nothing to do with any right to transmit or to receive, much less with the exercise of any right. Such a right to transmit, complete or incomplete (in the instant case it existed as to only part of the decedent's property, large amounts being first taken out by the STATES in which death duties had to be paid—*R. 3*—) may exist under State law or it may not exist; the exaction, if the law is valid, would be the same in either case. The right, where and to the extent that it exists in any particular case, may be exercised or it may not be exercised; the exaction would be the same in either case.

> "A tax is a property tax when imposed by reason of the ownership of property; a transfer tax when imposed on the method of its acquisition." *Matter of Vanderbilt, 172 N. Y. 69, 74; repeated, Matter of Keeney, 194 N. Y. 281, 285 (affirmed, 222 U. S. 525).*

Because it does not rest upon the existence or exercise of any privilege the property of the decedent must itself be the subject-matter of the exaction.

> "The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property." *Flint* v. *Stone Tracy Co., 220 U. S. 107, 163-4.*

That the exaction in issue is identical in character with the ESTATE DUTY imposed in ENGLAND by the FINANCE ACT OF 1894, may well have been concluded from previous discussion herein (*supra, 33-5*). But the substantial identity of these exactions is evidenced by two sentences from the fourth edition of HANSON'S *Death Duties*. The first of these sentences was quoted, as distinguishing the tax discussed in ***Knowlton*** v. *Moore, 178*

U. S. 41, from the ENGLISH estate duty. Referring to the latter, the decision in that case quotes and approves the following:

> "What it taxes is not the interest to which some person succeeds on a death, but the interest which ceased by reason of death." *178 U. S. 41, 49.*

Turning to the edition of HANSON from which the foregoing is an extract, it is found that the next sentence but one explains the ESTATE DUTY as follows:

> "It is leviable in respect of all property, both real and personal, of which the deceased could dispose, or in which an interest shifted by reason of his death." *Hanson, Death Duties, p. 63.*

It would be difficult so accurately to epitomize the exaction attempted by Sections 200 *et seq.* of the Act of CONGRESS of September 8, 1916, in fewer or different words. It will probably be conceded that CONGRESS has in fact attempted to provide for an exaction identical with the ENGLISH estate duty. It is for consideration, therefore, that the LORD CHANCELLOR OF ENGLAND, in *Attorney General* v. *Beech, L. R. App. Cas. (1899) 53*, a case arising under the ESTATE DUTY provisions of the Act of PARLIAMENT of 1894, decided by the HOUSE OF LORDS, declared that the ENGLISH tax *is one on property.* He said, in part:—

> "This is a statute which is intended on the face of it to impose a tax on property passing on death; that is the meaning of the statute. . . ." *p. 55.*

And note the identical conclusion expressed in the HOUSE OF LORDS in *Winans* v. *Attorney General, L. R. App. Cas. (1910) 27*, previously quoted and the change made by HANSON for the purpose of inserting an explicit assertion that this tax is one ON PROPERTY (*supra, 34-5*).

The exaction now contested was, therefore, levied precisely as the ENGLISH estate duty would have been levied if the decedent had been an ENGLISH subject, domiciled in ENGLAND and had left the same estate within the jurisdiction of an ENGLISH probate court. That is, it was based upon his whole estate, wholly irrespective of any act or omission to act on his part or on the part of any successor to all or any of the interests with which he parted.

This substantial identity with the ENGLISH estate duty, that is with the direct tax which, on the occasion of death, ENGLAND exacts from ENGLISH subjects, has been noted in at least two AMERICAN cases. Deciding, in *People v. Pasfield, 284 Ill. 450,* that the FEDERAL exaction should be deducted before computing the ILLINOIS death duty, the SUPREME COURT of that STATE said:—

> "The duty levied by the Federal Act of September 8, 1916, resembles very closely the old English probate duty established in 1694. . . . The Federal Act of September 8, 1916, levies a duty against the value of the entire mass of the decedent's property, real or personal, tangible or intangible, wherever situated . . . and makes the same a lien against the property in whosoever's hands the same may pass by transfer or otherwise." *284 Ill. 450, 453-4.*

And, reaching the same conclusion in a similar case, it was said, in NEW JERSEY:—

> "The tax occupies the same field of death duty as does the 'Estate Tax' in England." *Estate of Roebling, 89 N. J. Eq., 163, 166.*

The decision just quoted contains, also, the following:—

> "To be more precise, *it is imposed upon the* ES-

TATE, transferred by death, *and not upon the* SUCCESSION resulting from death. The distinction is well defined and recognized in countries where both kind of tax exists." *89 N. J. Eq. 163, 166.*

Such being the quality of the contested enaction, it seems to follow that, if a tax at all, it is a direct tax, at least within the definition proposed by ALEXANDER HAMILTON, when arguing for the CARRIAGE TAX sustained in *Hylton* v. *United States, 3 Dallas 171,* and repeated with apparent approval in the second decision in *Pollock* v. *Farmers' Loan & Trust Co., 158 U. S. 601.*

> "The following are presumed to be the only direct taxes. Taxes on lands and buildings. *General assessments,* whether *on the whole property of individuals,* or on their whole real or personal estate; all else must of necessity be considered as indirect taxes." *158 U. S. 601, 625.*

In the first decision in the case cited, there was quoted, also with approval, a definition given by ALBERT GALLATIN, in his *"Sketch of the Finances of the United States,"* published in 1796, as follows:

> "The most generally received opinion, however, is that by direct taxes in the Constitution, those are meant which are raised on the capital or revenue of the people; by indirect, such as are raised on their expense." *157 U. S. 429, 569.*

The evidence of all the decisions in the great case cited, majority and minority as well, indicates complete agreement in the view that a tax on land must be a direct tax and almost as general acceptance of the view that any tax on the whole estate, including both realty and personalty, would be a direct tax. The first decision applied the principle that a tax on income derived from

real property would be the same as a tax on the realty itself, and by the second decision this principle was held to apply, also, to income from personalty. Such was the conclusion of the case, and the doctrine thus established received final sanction by the adoption of the SIXTEENTH AMENDMENT. *Brushaber* v. *Union Pacific, 240 U. S. 1, 19; Eisner* v. *Macomber, 252 U. S. 189, 205.* Exactly what was sanctioned by this AMENDMENT is shown by the following question which was answered (*158 U. S. 601, 627-8*) in the affirmative:—

> "The Constitution prohibits any direct tax, unless in proportion to numbers as ascertained by the census; . . . is it not an evasion of that prohibition to hold that a general unapportioned tax, imposed upon all property owners as a body for or in respect of their property, is not direct, in the meaning of the Constitution, because confined to the income therefrom?" *158 U. S. 601, 627.*

And, similarly, the following was answered (*158 U. S. 601, 627-8*) in the negative:—

> ". . . can it be properly held that the Constitution . . . authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed *merely because of ownership and with no possible means of escape* from payment, . . ." *158 U. S. 601, 627.*

In the instant case, the exaction was "merely because of ownership and with no possible means of escape," but it was *laid not on the income of property*, but *directly upon the property itself.* It must have been on the property, for without parting with its ownership the tax could not have been avoided.

Another statement of the conclusions to be drawn

from the *Pollock case, supra,* is to be found in *Knowlton* v. *Moore, 178 U. S. 41.* So far as presently relevant, it follows:—

> "Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property." *178 U. S. 41, 82.*

In another and more recent decision it was said:—

> "The *Pollock case* construed the tax there levied as direct, because it was imposed upon property simply because of its ownership." *Flint* v. *Stone Tracy Co., 220 U. S. 107, 150.*

In the quite recent decision in *Eisner* v. *Macomber, 252 U. S. 189,* the rule of the *Pollock case, supra,* was further discussed (*252 U. S. 189, 202, 205, 218*) and it was declared:—

> "That Congress has power to tax shareholders upon their property interests in the stock of corporations is beyond question; . . . But this would be taxation of property because of ownership, and hence would require apportionment under the provisions of the Constitution, is settled beyond peradventure by previous decisions of this Court." *252 U. S. 189, 217.*

The only apparent distinction between the exactions discussed in the cases cited and that illustrated by the case at bar is that, although they all rest upon property

by reason of ownership, the periodicity of the others is fixed with reference to the year, while the occasion of death fixes the periodicity of this exaction with reference to the duration of particular human generations. Doubtless there is nothing in the nature of one of these periods, as compared with the other, which could change the nature of a tax so that one which would be direct, if imposed yearly, would become indirect because imposed but once in a generation.

It is submitted, that the present exaction is inseparably connected with ownership, so that, *if it is a tax, it is a tax which cannot exist without ownership or ownership exist without the tax* and that, therefore, it is unquestionably direct and void for want of apportionment.

> "I can form no notion of property which does not include the essential characteristics and attributes with which it is clothed by the laws of Society. . . . Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment. . . . Indeed, if any one can define property eliminated of its attributes, incapable of sale, and placed without the protection of the law, it were well that the attempt should be made." *Wynehamer* v. *People, 13 N. Y. 378, 396-7.*

The CONSTITUTIONAL regulation, requiring the apportionment of direct taxes, was designed to prevent attacks upon accumulated property in the guise of taxation and it continues as one of the safeguards of private rights and private property. Mr. CHIEF JUSTICE FULLER, speaking for the majority of this COURT in the *Pollock case, supra,* referred to this rule of apportionment, saying that it—

> ". . . was manifestly designed to . . . pre-

vent an attack upon accumulated property by mere force of numbers." *157 U. S. 429, 583.*

See, also:

> *Knowlton* v. *Moore, 178 U. S. 41, 82;*
> *Brushaber* v. *Union Pacific Railroad, 240 U. S. 1, 16.*

The case last cited is authority for the view that, in the *Pollock case, supra,* the COURT concluded that—

> ". . . the classification of direct was adopted for the purpose of rendering it impossible to burden by taxation accumulations of property, real or personal, except subject to the regulation of apportionment, . . ." *240 U. S. 1, 16.*

In common speech and understanding the property left by a decedent represents his "accumulations," it is always "accumulated property." No plainer "burden" upon such "accumulations of property," *real and personal,* could be laid than that attempted to be laid by the contested sections of the Act of September 8, 1916. How heavy the "burden" thus attempted to be laid, and how readily the system could be developed into the "attack upon accumulated property," referred to in the *Pollock case, supra,* are evidenced by the fact (*supra,*) that the original rates ranged from one to ten per cent; those of the Act of March 3, 1917, ranged from one and one-half to fifteen per cent, and those of the Act of October 3, 1917, from two to twenty-five per cent. If the exaction made from PLAINTIFFS-IN-ERROR is valid, and can be retained by DEFENDANT-IN-ERROR, there would be nothing to prevent the enactment of much higher rates.

"If by calling a tax indirect when it is essentially direct, the rule of protection could be frittered

away, one of the great landmarks between the NATION and the STATES of which it is composed, would have disappeared, and with it one of the bulwarks of private rights and private property." *Pollock* v. *Farmers' Loan & Trust Co., 157 U. S. 429, 583.*

Seventh.—3. The words "the transfer of," in the phrase "is hereby imposed upon the transfer of the net estate of every decedent," are of no effect and cannot overcome the actual character of the exaction."

THE CONTESTED EXACTION, called in the statute "THE TAX," is, in the words of the enactment,—

> "imposed upon the transfer of the net estate of every decedent." *Section 201.*

PLAINTIFFS-IN-ERROR contend that upon an examination of the whole law, it plainly appears that the words—

> "the transfer of,"

in the foregoing, are without meaning or effect, and that the substantial result of the statute is the same as though these words were not in the imposing clause and therefore, as though it read, merely:—

> "imposed upon the net estate of every decedent."

A statutory misdescription of a tax does not change its character and the mere declaration of the legislative body that an exaction shall be considered as belonging to a particular class, although entitled to much weight, will not prevail over the actual meaning and effect of the Act.

> "While the mere declaration contained in a statute that it shall be regarded as a tax of a particular

character does not make it such if it is apparent that it cannot be so designated consistently with the meaning and effect of the Act, nevertheless the declaration of the law-making power is entitled to much weight, . . ." *Flint* v. *Stone Tracy Company*, *220 U. S. 107, 145.*

That such statutory misnomers cannot control, see:—

Pace v. *Burgess, 92 U. S. 372, 376;*
Inman Steamship Co. v. *Tinker, 94 U. S. 238, 244;*
Kentucky Railroad Tax Cases, 115 U. S. 321;
Knowlton v. *Moore, 178 U. S. 41, 80, 83;*
Helwig v. *United States, 188 U. S. 605, 611;*
Western Union Telegraph Co. v. *Kansas, 216 U. S. 1, 27;*
Ludwig v. *Western Union Telegraph Co., 216 U. S. 146, 162;*
Kansas City Ry. Co. v. *Botkin, 240 U. S. 227, 231, 235;*
Wagner v. *Covington, 251 U. S. 95.*

Brief extracts from two opinions in this COURT further illustrate the principle supported by these citations.

"Neither the State courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect." *Galveston, Harrisburg & San Antonio R. R. Co.* v. *Texas, 210 U. S. 217, 227.*

". . . our decision must depend not upon the form of the taxing scheme, or any characterization of it adopted by the courts of the State, but rather upon the practical operation and effect of the tax as applied and enforced. The State court could not

render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal constitution; . . . *St. Louis Southwestern Ry.* v. *Arkansas, 235 U. S. 350, 362.*" *Wagner* v. *Covington, 251 U. S. 95, 102.*

The foregoing citations may probably be regarded as presenting a particular case of the general and most necessary rule that *substance rather than form must control* when the inquiry is whether CONGRESS has exceeded its CONSTITUTIONAL powers.

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority." *Mugler* v. *Kansas, 123 U. S. 623, 661.*

This rule has been repeatedly applied to questions of FEDERAL taxation and especially in seeking to distinguish those exactions which must be apportioned from those which must be uniform. Mr. CHIEF JUSTICE FULLER, speaking for the majority of this COURT, in the first decision in *Pollock* v. *Farmers' Loan & Trust Company, 157 U. S. 429*, said:—

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this Court." *157 U. S. 429, 581.*

See also:—

Brown v. *Maryland, 12 Wheat. 419, 444;*
Weston v. *Charleston, 2 Pet. 449;*
Dobbins v. *Erie County Commissioner, 16 Pet. 435;*
Almy v. *California, 24 How. 169, 174;*
Crandall v. *Nevada, 6 Wall. 35;*
Northern Central v. *Jackson, 7 Wall. 262;*
Welton v. *Missouri, 91 U. S. 275;*
Henderson v. *Major, 92 U. S. 259, 268;*
Cook v. *Pennsylvania, 97 U. S. 259, 268;*
Telegraph Co. v. *Texas, 105 U. S. 460, 465;*
Tennessee v. *Whitworth, 117 U. S. 129, 135;*
Philadelphia & Southern S. S. Co. v. *Pennsylvania, 122 U. S. 326, 336;*
Western Union Telegraph Co. v. *Massachusetts, 125 U. S. 530, 552;*
Leloup v. *Mobile, 127 U. S. 640;*
Postal Telegraph Cable Co. v. *Adams, 155 U. S. 688, 698;*
Chicago, Burlington & Quincy R. R. Co., v. *Chicago, 166 U. S. 226, 235;*
Smyth v. *Ames, 169 U. S. 466, 527;*
Nicol v. *Ames, 173 U. S. 509, 516;*
Fairbank v. *United States, 181 U. S. 283, 296;*
McCray v. *United States, 195 U. S. 27, 59;*
Prentis v. *Atlantic Coast Line, 211 U. S. 210, 226;*
Western Union Telegraph Co. v. *Kansas, 216 U. S. 1, 27;*
Pullman Company v. *Kansas, 216 U. S. 56;*
Ludwig v. *Western Union Telegraph Co., 216 U. S. 146, 162;*
Brushaber v. *Union Pacific R. R. Co., 240 U. S. 1, 16;*

Bullen v. *Wisconsin, 240 U. S. 625, 630, 631;*
Shaffer v. *Carter, 252 U. S. 37, 55;*
Eisner v. *Macomber, 252 U. S. 189;*
Evans v. *Gore, 253 U. S. 245.*

Applying the principle of the foregoing to Title II, of the Act of September 8, 1916, it seems impossible to find that the words, "the transfer of" (*Section 201*), have any substantial effect. On the contrary, stripped of this slender disguise, the exaction stands revealed as one attaching *directly* to the property "of every decedent" by reason of ownership; in other words, as a direct tax in the sense of the CONSTITUTIONAL requirement of apportionment.

The statute provides that:—

> "the executor shall pay the tax." *Section 207.*

and

> "If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution." *Section 208.*

The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, has, as already noted, ruled that:—

> "The tax is imposed in the case of the estate of 'every decedent,' . . ." *Internal Revenue Regulations 37; Revised, 1919; Article 4.*

and that:

> "The transfer of property is taxable, although it escheats to the State for lack of heirs." *Internal Revenue Regulations 37; Revised, 1919; Article 1.*

The same authorities originally pronounced that:—

> "This is not an inheritance tax, . . ." *Internal Revenue Regulations 37; May, 1917; Article IV.*

although, on second thought, they decided to say:—

> "It is not an individual inheritance tax." *Internal Revenue Regulations 37; Revised, 1919; Article 1.*

The Treasury Department has made it apparent that, in its view, *the inclusion of the words "the transfer of" do not modify the practical effect or substantial meaning* of the section, having officially proclaimed that:—

> "The *practical test** of the existence *of a taxable transfer** is whether the statute directs that *the property in question be included in the gross estate.**" *Internal Revenue Regulations 37; Revised, 1919; Article 2.*

In other words, the Treasury Department declares that, whenever there is (1) *death* and (2) *ownership,* (3)

*These words were not italicised in the original.

a transfer IS CONCLUSIVELY PRESUMED. Yet the DEFENDANT-IN-ERROR undoubtedly, will here and now contend that, *without in any respect changing the substance of the law*, the inclusion of those three words, "the transfer of," transforms what, without them, would plainly be a direct tax on property by reason of its ownership into an excise tax on the exercise of a right or privilege. This cannot easily be admitted without concluding that, in the exercise of the vast power of taxation, *form* has become more important and significant than *substance*. This COURT, as already shown, *supra, 164-6*, has held otherwise in a long line of carefully considered cases involving the taxing power.

Seventh.—4. It would be void if it were a capitation tax.

THE CONSTITUTIONAL REGULATION, requiring apportionment, applies to capitation taxes as well as to "other direct taxes" so that the "Estate Tax" of September 8, 1916, would be UNCONSTITUTIONAL if it could be considered as a capitation tax. Only by the widest extension of the meaning in which the term is ordinarily understood, and ignoring essential characteristics of the exaction that seem to require a different classification, could it be assigned to this category. Yet a very eminent member of the bar of this COURT, in a brief filed in the *Corporation Tax case, 220 U. S. 107*, said:—

> "Any tax when placed on the right of the man or of the corporation to live is a capitation tax and as direct as any tax can be." *Maxwell Evarts, Esquire, 220 U. S. 107, 119.*

As the exaction now in question rests upon the exercise of no right or privilege, but, if valid, requires only (1) ownership of property and (2) death, it would seem

to follow that it is either on (1) the property by reason of the ownership of the decedent or (2), paraphrasing the language of Mr. Evarts, on "the right of the man . . . to die." If so, it would perhaps be considered to be a capitation tax and void for lack of the constitutional apportionment.

CONSIDERED AS AN UNJUSTIFIABLE TAKING.

EIGHTH.

The exaction complained of is a mere unjustifiable taking of private property without due process of law.

The so-called "Estate Tax," provisions of the Act of September 8, 1916, have now been successively examined as though the exaction for which they provide could be considered as properly belonging *in each, and every one of, the several categories* to which it might *conceivably* be assigned (*supra, 14*). It is considered to have been shown that the exaction (1) could not be sustained as a *price* paid in consideration of some privilege related to the transmission of decedents' estates because the Federal government has no such privilege to bestow, either gratuitously or upon terms (*supra, 19-21*); (2) that it is void if it amounts to *a regulation of descent and distribution* because exclusive authority in this field is severally possessed by the States (*supra, 35-66*); (3) that it would fail as *a tax in respect of the transfer of the whole estate* because there is no such transfer except the transfer of the universal succession to the personal representatives and that transfer is wholly the creature of State law, set up by the State for its own purposes, in a very real sense adverse to the owners of property and their customary successors under the laws of descent and dis-

tribution and an essential step in the process of administration by means of which the STATE performs its functions (*supra, 66-96*); (4) that as *a tax in respect of interests passing to those beneficially interested* in decedents' estates or as *an income tax* it would be void by reason of its gross and capricious inequalities (*supra, 97-138*), and that if it is *a "capitation or other direct tax"* it lacks the CONSTITUTIONAL apportionment (*supra, 139-168*).

No effort has been made to fix the proper classification of the exaction in issue, although considerations which might determine the category to which it belongs have been examined under several of the headings suggested. The form of the argument has been that of *exclusion* and PLAINTIFFS-IN-ERROR consider that exacting method now to have been pressed to the point at which nothing is left save to class the exaction as one which finds no CONSTITUTIONAL support.

> "It is only one of many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property." *State Tax on Foreign-Held Bonds, 15 Wall. 300, 321.*

Upon the foregoing considerations, PLAINTIFFS-IN-ERROR respectfully submit that the necessity for judicial relief is plainly indicated.

> "When as may sometimes happen, the legislature transcends its functions and enacts, in the guise of a tax law, a law whereby the property of the citizen is confiscated, or taken for private purposes, the judiciary has the right and duty to interfere." *Thomas* v. *Gay, 169 U. S. 264, 283.*

Every such taking of property is without a doubt a taking of property without due process of law and con-

trary to the FIFTH AMENDMENT to the CONSTITUTION of the UNITED STATES. See:—

> *Scott* v. *McNeal, 154 U. S. 34, 45;*
> *Norwood* v. *Baker, 172 U. S. 269;*
> *French* v. *Barber Asphalt Co., 181 U. S. 324, 344;*
> *Wright* v. *Davidson, 181 U. S. 371, 384-5;*
> *Ballard* v. *Hunter, 204 U. S. 241, 256;*
> *Wagner* v. *Baltimore, 239 U. S. 207, 220;*
> *Brushaber* v. *Union Pacific Railroad, 240 U. S. 1, 24-5;*
> *Green* v. *Frazier, 253 U. S. 233, 238-9.*

NINTH.

This act of legislation, if otherwise unconstitutional, could not be made constitutional by showing that the objections to its constitutionality were not pressed in respect of somewhat similar but far less burdensome exactions imposed by a prior statute.

DEATH DUTIES WERE NOT, in 1916, an wholly novel device in FEDERAL finance. Using the term in its broadly generic sense (*Knowlton* v. *Moore, 178 U. S. 41, 56*), such duties had been enforced during three previous periods. The first of these periods extended from July 1, 1798, to July 1, 1802 (*1 Stat. 527; 2 Stat. 148*); the second, from July 1, 1862, to June 6, 1872 (*12 Stat. 483, 485, 487; 13 Stat. 285, 287, 299, 300, 481; 14 Stat. 140, 475; 16 Stat. 256; 17 Stat. 256*), and the third, from June 13, 1898, to June 30, 1902 (*30 Stat. 448; 31 Stat. 446; 32 Stat. 92*). *West** states that $14,805,647.90 was obtained from the death duties of the CIVIL WAR period (1862-1871) and

*Dr. MAX WEST, *The Inheritance Tax;* Columbia University; Studies in History, Economics and Public Law, Vol. IV, No. 2, p. 93.

$22,520,261.83 from those of the SPANISH WAR period (1898-1902).

The only questions of general CONSTITUTIONAL power judicially determined in connection with the death duties of any of these periods were those determined in *Scholey* v. *Rew, 23 Wall. 331, and Knowlton* v. *Moore, 178 U. S. 41.* As already shown (*supra, 22-34*), these cases establish the power of CONGRESS to impose taxes in respect of the exercise of rights to receive by testate or intestate succession and have no bearing upon the instant case, unless the exaction here the subject of complaint can be considered as a tax in respect of the exercise of rights to receive by J. HARSEN PURDY's legatees (and in that case it is contended, *supra, 97-138*, that the exaction would be void on account of inequality and as a burden upon the exercise of STATE power to regulate descent and distribution).

But, in addition to legacy and succession taxes, the Act of July 1, 1862 (*12 Stat. 432*) provided for certain documentary stamp taxes (*12 Stat. 432, 475*). "Schedule B," of that Act (*12 Stat. 432, 483-4*) is a list of the written or printed instruments required to be stamped, and this list includes, *inter alia*, the following:—

> "Probate of will, or letters of administration: Where the estate and effects for or in respect of which such probate or letters of administration applied for shall be sworn or declared not to exceed the value of two thousand five hundred dollars, fifty cents. . . .
>
> "To exceed two thousand five hundred dollars and not exceeding five thousand dollars, one dollar.
>
> "To exceed five thousand dollars and not exceeding twenty thousand dollars, two dollars.
>
> "To exceed twenty thousand dollars and not exceeding fifty thousand dollars, five dollars.

"To exceed fifty thousand dollars and not exceeding one hundred thousand dollars, ten dollars.

"Exceeding one hundred thousand dollars and not exceeding one hundred and fifty thousand dollars, twenty dollars.

"And for every additional fifty thousand dollars, or fractional part thereof, ten dollars.

. . . .

"Legal documents:

"Writ or other original process by which any suit is commenced in any court of record, either law or equity, fifty cents.

"*Provided*, That no writ, summons, or other process issued by a justice of the peace, or issued in any criminal or other suits commenced by the United States or any State, shall be subject to the payment of stamp duties: *And provided, further*, That the stamp duties imposed by the foregoing schedule B on manifests, bills of lading, and passage tickets, shall not apply to steamboats or other vessels plying between ports of the United States and ports in British North America."

The stamp taxes on "probate of will or letters of administration" indicated by the foregoing were referred to in *Knowlton* v. *Moore, 178 U. S. 41, 51-2, 68,* as having established a probate duty "proportioned to the amount of the estate," similar to the English probate duty which was finally evolved into the present English estate duty (*supra, 33, 154; Knowlton* v. *Moore, 178 U. S. 41, 49*). But the reference to these stamp taxes in *Knowlton* v. *Moore, supra*, is without any expression of opinion as to the CONSTITUTIONALITY of such taxes.

Doubt concerning the validity of stamp taxes in respect of documents essential to proceedings in STATE

courts was expressed by Mr. JUSTICE BROWN, who delivered the opinion for the majority of this COURT in *Snyder* v. *Bettman, 190 U. S. 249.* Referring to these taxes, imposed by the Act of 1862, he said:—

> "This Act was treated as applicable to the State courts, although its constitutionality may well be doubted." *190 U. S. 249, 252-3.*

The "opposition of the STATE courts" to FEDERAL taxation of "legal documents," required in their proceedings (*Craig* v. *Dimock, 47 Ill. 308, 313*) and their general refusal to acknowledge any right in CONGRESS to interfere with or affect their proceedings by taxation in any form have already been set forth in this brief (*supra, 83-92*).

Moreover, the principle of these stamp taxes is directly opposed, it is conceived, to the decision in *Ambrosini* v. *United States, 187 U. S. 1, 7* (*supra, 90-1*).

And in *Sherman* v. *United States, 178 U. S. 150,* a case under the LEGACY TAX ACT, of June 13, 1898, decided on the same day with *Knowlton* v. *Moore, supra,* one of the CONSTITUTIONAL questions raised by the instant proceeding was expressly reserved. The opinion says:

> "The allegation in the complaint that 'it is not within the constitutional power of Congress to require the payment of a larger or different amount of tax from or imposed upon a legacy or a legatee because of the greater wealth of the donor of such legatee than is required when the legacy is the gift of a testator of smaller means,' need not be considered, because this court has held in the case of *Knowlton, Executor* v. *Moore,* that upon a proper consideration of the Act of June 13, 1898, the amount of the inheritance or legacy tax levied there-

under is measured by the amount of the legacy or distributive share passing under the laws of the State, and not by the amount of the estate of the testator or of the deceased owner." *178 U. S. 150. 151-2.*

The history of CONGRESSIONAL tax legislation during the CIVIL WAR period indicates that, although it is *now* plain that stamp taxes in respect of letters of administration issuing from the probate courts of the STATES. *when measured by the value of the whole estate,* are not different in principle from probate duties (which are "the price of obtaining probate"—HANSON, *supra, 34*), it was not, at first, observed that the power to require the use of documentary stamps might be limited by the fact that in some cases such requirements would burden STATE functions which cannot CONSTITUTIONALLY be made the subject of FEDERAL taxation. Apparently, CONGRESS, at the beginning, took the superficial view that these were *stamp taxes upon documents and nothing more*, and gave no heed even to the fact that as such, if imposed in respect of original writs, bonds required of STATE officers to insure faithful performance of their duties, letters of administration, etc., they would impede in an UNCONSTITUTIONAL manner, the normal operations of the STATES.

Whatever may have been the theory upon which CONGRESS took up the struggle to meet the enormous burden of CIVIL WAR expenditure, it was not long possible to overlook the essential limitations upon the FEDERAL power to tax. The STATE courts were prompt to uphold the integrity of their powers and denied not only the authority of CONGRESS to tax their writs and process but, also, its power to deny efficacy, in their proceedings, to unstamped documents. See cases examined and cited at an earlier point in this brief (*supra, 83-92*). The pro-

hibitions against the use of unstamped documents as evidence were not enacted until 1864 (*Act of June 30, 1864; 13 Stat. 218, Sections 152 and 163*), when CONGRESS also increased the amount of the stamp taxes to be paid on "probate of wills and letters of administration" (*13 Stat. 218, 300*). The Act of July 13, 1866 (*14 Stat. 98*), reenacted the prohibition against the admission of unstamped documents in evidence but it contained, also, the following:—

> "That all official instruments, documents, and papers issued . . . by the officers of any State, county, town, or other municipal corporation, shall be and hereby are, exempt from taxation, *Provided*, That it is the intent hereby to exempt from liability to taxation such State, county, town, or other municipal corporation, in the exercise only of functions strictly belonging to them in their ordinary governmental and municipal capacity." *14 Stat. 98, 141.*

It is reasonable to consider the foregoing as recognition that, in the Acts of 1862 and 1864, CONGRESS had exceeded its CONSTITUTIONAL powers. That it was intended to repeal the tax in respect of "probate of wills and letters of administration," would seem to be a natural conclusion from the language used, for clearly "letters of administration" and orders admitting wills to probate are nothing less than "official instruments . . . issued . . . by officers" of STATES. Yet it is to be noted that the Act of March 2, 1867 (*14 Stat. 471*), contained the following:—

> "That no stamp either for probate of wills, or letters testamentary, or of administration, . . . shall be required when the value of the estate and effects, real and personal, does not exceed $1,000.00; . . . ." *14 Stat. 471, 475.*

A principal interest in the foregoing is that it contains the first and only reference in terms in connection with the stamp tax legislation of the CIVIL WAR period, to "letters testamentary." It is obvious that, if the Act of 1866, repealed, as its language would seem to require, the stamp tax in respect of probates, Congress, less than a year later, overlooked the repeal and attempted to amend the repealed provisions.* Be that as it may, it is clear that the taxes under discussion were insignificant in amount when enforced and that their enforcement was feeble and their avoidance general.

At the rates of 1862, the stamps to be affixed to letters of administration, in the case of an estate of $20,000,000, if there was any estate of that value in the country at that time, would have cost $3,990.00 or *less than one-fiftieth of one per cent* of the value of the estate; at the rates of 1864, the cost of the stamps required on the issue of letters would have been $10,000.00 or *one-twentieth of one per cent* of the value of the estate. On a $200,000 estate the tax, at the 1862 rates, would have been $30.00 and at those of 1864, $100.00.

No data showing the exact amounts collected from the different stamp taxes of the Acts of 1862 or 1864 appear to be in existence. But evidence that only insignificant amounts can have been collected from stamps on letters testamentary or of administration remains. The Act of 1864, Schedule B, enumerated thirty-eight different docu-

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*The suggestion of such an oversight may not seem over-drawn to those whose historical knowledge enables them to visualize the conditions then prevailing. The LEGISLATIVE DEPARTMENT was in the midst of a long and bitter struggle with the EXECUTIVE DEPARTMENT; the FOURTEENTH AMENDMENT was under discussion throughout the STATES; the stormy career of the THIRTY-NINTH CONGRESS was brought to an end by its final adjournment on the very day that the amendment was adopted.

ments, or classes of documents, to which stamps were required to be affixed. Yet, HON. DAVID A. WELLS, reporting as CHAIRMAN OF THE REVENUE COMMISSION, in January, 1866, said:—

> ". . . one-third of the revenues received from stamps for the fiscal year 1865 were derived from the three items of 'bank-check,' 'receipt,' and 'match stamps;' and from the first two (bank-check and receipt stamps) the receipts of the fiscal year 1865 averaged about $200,000.00 per month." *House Ex. Doc. 34, 39th Congress, 1st Session, p. 30.*

Other documents requiring stamps included bills of exchange, bills of lading, bills of sales of vessels, bonds, charter parties, stock certificates, certificates of deposit, telegrams, insurance policies, leases of land or buildings, ships' manifests, mortgages, tickets for passenger transportation, powers of attorney, promissory notes, protests, receipts, etc., etc. Mr. WELLS' statement obviously includes the stamps required on the articles, not documentary, enumerated in Schedule C, which included proprietary medicines, playing cards, perfumery, cosmetics and other articles. Plainly there was little left to have been collected in respect of letters testamentary or of administration. In the report quoted above, Mr. WELLS also stated that the legacy tax had been "practically a dead letter" (*House Ex. Doc. 34, 39th Congress, 1st Session, p. 13*). It must be evident that with the legacy tax in that situation, not much could have been collected from the related stamp tax.

The COMMISSIONER OF INTERNAL REVENUE (Mr. ROLLINS), in his report for 1865, referring generally to the stamp taxes, said:

> ". . . evasion and violation are frequent and,

though the amount lost to the revenue may be small in individual instances, it is large in the aggregate." *Quoted by Dr. Harry Edwin Smith; The United States Federal Internal Tax History, from 1861 to 1871; p. 156.*

Commissioner Delano, in 1869, said:

"The one salient point, however, that we fail to collect as much revenue as our system ought to yield, cannot be ignored. . . . One undoubted cause is that parties frequently omit to stamp instruments required to be stamped by law. This is the result of negligence, frequently, and often of design." *Ibid. p. 165.*

Nothing in the Act of 1797 (*1 Stat. 527*) parallels in any degree the present exaction. A special revenue committee of the House of Representatives had recommended (*1 American State Papers in Finance, 277*), on April 17, 1794, a stamp tax on "probates of wills and letters of administration," but the project was abandoned and the statute, as enacted, imposed a stamp tax on legacies and distributive shares, *i. e.*, a tax wholly within the principle of *Scholey* v. *Rew, 23 Wall 331, and Knowlton* v. *Moore, 178 U. S. 41.*

The inherent weakness of any suggestion that the vastly important issues in this proceeding could have been settled so as to preclude present inquiry is perhaps as plainly disclosed as would be possible in any other form, by noting that *Springer* v. *United States, 102 U. S. 586*, was unanimously decided on October 5, 1880, following a long enforcement of the tax there under attack, and that the decisions in *Pollock* v. *Farmers' Loan & Trust Co., 157 U. S. 429, and 158 U. S. 601*, were rendered on April 8, 1895, and May 20, 1895, respectively. The in-

come tax of the Civil War period was a burden of considerable magnitude; the insignificant tax which, although payable in stamps, may have been somewhat similar to the death duty attempted to be enacted by the Act of September 8, 1916, was relatively light and unimportant in its consequences. Moreover, the rule of *stare decisis*, without being a rule of binding force, is surely a rule of higher sanction than any rule of practical or contemporaneous construction or continued acquiescence. Basis, even, for the application of any such rule is considered to be lacking in the instant case.

In *Fairbank* v. *United States, 181 U. S. 283,* in which the stamp tax provided for by the Act of June 13, 1898 (*30 Stat. 448*), was held to be unconstitutional, as applied to bills of lading issued in respect of the movement of exports, it appears to have been argued that the constitutional objections to the tax were foreclosed by *some history of practical construction or continued acquiescence.* But these arguments were rejected, the majority opinion noting the slighter incentive to raise such questions when the burden of taxation was less onerous and declaring the duty fully to consider them whenever presented.

> "Indeed, it is only of late years, when the burdens of taxation are increasing by reason of the great expenses of government, that the objects and modes of taxation have become a matter of special scrutiny. But the delay in presenting these questions is no excuse for not giving them full consideration and determining them in accordance with the true meaning of the Constitution." *181 U. S. 283, 312.*

C.

THE QUESTION OF INTERPRETATION.

Plaintiffs-in-error paid death duties, for the account of the estate here represented, in six States; New York (the State of their testator's domicile), Colorado, Wisconsin, Kansas, Michigan and New Jersey (*R. 4*). The aggregate of these payments was $37,769.88 (of which New York received $32,988.97 and New Jersey $2,396.88) and the whole of this $37,769.88 was credited to these executors in an account properly allowed by the Surrogates' Court, entitled:—

> "*A statement of all moneys paid by us for funeral and other necessary expenses of administration of the estate, chargeable to principal.*" *R. 4-5.*

Plaintiffs-in-error claimed that the whole of this $37,769.88 should be deducted before computing the "tax" demanded by defendant-in-error under Sections 200 *et seq.* of the Act of September 8, 1916, basing their claim upon that part of Section 203 which reads:—

> "Sec. 203. That for the purpose of the tax the value of the net estate shall be determined—
>
> "(a) In the case of a resident, by deducting from the value of the gross estate—
>
> "(1) Such amounts for . . . administration expenses, claims against the estate, . . . and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered:"

Defendant-in-error refused to permit this deduction and his refusal added $1,888.49 (*R. 6*) to the amount which he exacted.

Thus arises *the question of interpretation presented by this writ of error.*

This general question of the right to deduct STATE death duties before computing the FEDERAL "tax" has been judicially examined in *four cases*, and in these cases there are now *five decisions* of which *only one*, that by the DISTRICT COURT in the instant case, sustains the view taken by DEFENDANT-IN-ERROR.

The CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT decided, in *Lederer* v. *Northern Trust Company, 262 Fed. 52; certiorari denied, 253 U. S. 487*, that the PENNSYLVANIA collateral inheritance tax should be deducted, affirming the judgment of the DISTRICT COURT *(257 Fed. 812)* FOR THE EASTERN DISTRICT OF PENNSYLVANIA, in the same case. This conclusion was followed by the DISTRICT COURT for the WESTERN DISTRICT OF PENNSYLVANIA, in *Grener* v. *Lewellyn*, not yet reported. In *Sayre* v. *Brewster, 268 Fed. 553*, the DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK decided that the NEW YORK inheritance tax should be deducted.

DEFENDANT-IN-ERROR based his refusal to permit the deduction of the death duties paid to the several STATES upon a ruling *(R. 6)* by an ACTING COMMISSIONER OF INTERNAL REVENUE, approved by an ACTING SECRETARY OF THE TREASURY, as follows:—

> "An exhaustive study of the nature of State inheritance taxes has led this office to the conclusion that amounts paid to States on account of inheritance, succession, or legacy taxes are not 'such other charges against the estate, as are allowed by the laws of the jurisdiction,' and accordingly are not deductible in arriving at the amount of Federal estate tax. T. D. 2395 is hereby revoked."

The foregoing was issued on September 10, 1917 (*R. 6*). Ten months earlier, on November 17, 1916, the COMMISSIONER OF INTERNAL REVENUE had issued T. D. (*Treasury Decision*) 2395 (*R. 8*), which was thus reversed and revoked. The ruling thus revoked concluded as follows:—

> "Since *it does not appear open to question that State inheritance taxes are a primary charge against an estate* and allowable as credits to executors and administrators in every State imposing such taxes, they are clearly deductible from the gross estate of the decedent where property and interests are liable to the Federal Tax imposed in Title II of the Act of September 8, 1916."

The reversal of the foregoing by the ruling of September 10, 1917, (*supra, 182*) gave rise to the question of interpretation here presented. It is, briefly, whether the ruling of September 10, 1917, or the earlier ruling of November 17, 1916, represents the true meaning of Section 203. PLAINTIFFS-IN-ERROR respectfully contend that the earlier ruling was correct and that the later ruling is wrong. In support of this contention it will be argued:—

First.—Taxpayers are entitled to a liberal construction of Section 203 (*Infra, 185*).

Second.—The pleadings show that the State inheritance and succession taxes paid in the case at bar were actually allowed as charges against the estate by the jurisdiction in which the estate was lawfully administered and this makes the requirement for their deduction before computing the Federal Tax peremptory (*Infra, 187*).

Third.—Congress intended to impose the tax in respect of only so much of decedents' estates as should

pass to those beneficially entitled. Any other interpretation would result in profound inequality and injustice and should be avoided (Infra, 190).

Fourth.—If the right to deduct the New York transfer tax is to be determined by the special character of that tax it will be found to be a necessary deduction, but it is not possible to believe that Congress intended that Section 203 should be so narrow as to require minute inquiry concerning the theoretical character of the death duties of more than forty States, thus varying the practical results of the tax in different regions and permitting the deduction to certain estates and forbidding it to others (Infra, 199).

Fifth.—Death duties paid in States other than the State of domicile are paid in respect of the universal succession of personal representatives and must, therefore, be charges against the estate within the meaning of Section 203 (Infra, 208).

Sixth.—The enactment, as part of the "Revenue Act of 1918," of an express prohibition of deductions of the sort here claimed indicates that Congress considered that the previous statute, which is now before the Court, permitted the deduction (Infra, 211).

Seventh.—The diversion to a State of part of the property of estates by means of death duties is pro tanto a denial of the right or privilege to transmit from the dead to the living and Congress is without power to impose a tax in respect of the denial of any privilege. (Infra, 213).

The foregoing will be examined in their order.

FIRST.

Taxpayers are entitled to a liberal construction of Section 203.

THE RIGHT TO DEDUCT STATE death duties before the computation of the FEDERAL "tax" appears to have been so plainly given by the Act that it is probably of little significance in this case that the well-established rule requires every substantial doubt and ambiguity arising in such an inquiry as that now in progress to be resolved in favor of the taxpayer. Such, however, is the rule. The question whether PLAINTIFFS-IN-ERROR are required to pay a FEDERAL tax upon the taxes they have paid to other AMERICAN taxing authorities is not likely to be treated with less regard to the taxpayer than the question whether a wife should pay the FEDERAL income tax in respect of *alimony* received from her divorced husband. Holding that she should not, in *Gould* v. *Gould, 245 U. S. 151,* this COURT, by MR. JUSTICE MCREYNOLDS, said:—

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government and in favor of the citizen." *245 U. S. 151, 153.*

The foregoing is cited in the opinion in *United States* v. *Field, decided on February 28, 1921,* the only case involving the "tax" here in issue, hitherto heard in this COURT.

See also:—

> *Van Horne's Lessee* v. *Dorrance, 2 Dall. 304, 316;*
> *United States* v. *Isham, 17 Wall. 496, 504;*

Tennessee v. *Whitworth*, *117 U. S. 129, 137;*
Hartranft v. *Wiegmann*, *121 U. S. 609;*
American Net & Twine Co. v. *Worthington*, *141 U. S. 468;*
Treat v. *White*, *181 U. S. 264, 267;*
Eidman v. *Martinez*, *184 U. S. 578, 583;*
Benziger v. *United States*, *192 U. S. 38, 55;*
Crocker v. *Malley*, *249 U. S. 223, 233;*
Edwards, Collector v. *Wabash Railway* (*C. C. A.*), *264 Fed. 610, 618-9.*
United States v. *Wigglesworth*, *2 Story 369, 373-4;*
In re Estate of Ullman, *263 Ill. 528, 530;*
Hall Company v. *Commonwealth*, *215 Mass. 326, 329;*
Attorney General v. *Clark*, *222 Mass. 291, 294;*
Hill v. *Treasurer and Receiver General*, *229 Mass. 474, 475;*
State v. *Probate Court*, *137 Minn. 238, 239;*
Torrance v. *Edwards*, *89 N. J. L. 507, 510-1;*
Matter of Euston, *113 N. Y. 173, 177-8;*
Matter of Vassar, *127 N. Y. 1, 12;*
Matter of Fayerweather, *143 N. Y. 114, 119;*
Matter of Cooley, *186 N. Y. 220, 227;*
Smith v. *Browning*, *113 N. Y. 173, 177-8;*
English v. *Crenshaw*, *120 Tenn. 531, 539;*
Crenshaw v. *Moore*, *124 Tenn. 528, 531;*
In re Bullen's Estate, *47 Utah 96, 102;*
Schoolfield's Executor v. *City of Lynchburg*, *78 Va. 366, 373;*
In re Estate of Curtis, *88 Vt. 445, 449.*

If CONGRESS did not express a purpose to change the substance of the law by the prohibition against these deductions enacted on February 24, 1919 (*infra*, *211*),

the new language at least, establishes the existence of a doubt as to the meaning of Section 203, in its original form. As has been said by this COURT with regard to a change in Section 202 (*now 402*) effected by the same revision (*40 Stat. 1097*):

> "Its insertion indicates that Congress at least was doubtful. . ." *United States* v. *Field*, —— *U. S.* ——, ——, *decided on February 28, 1921.*

If CONGRESS was in doubt there must have been, at the least, an ambiguity that ought not to be resolved against the taxpayer.

SECOND.

The pleadings show that the State Inheritance and Succession Taxes paid in the case at bar were actually allowed as charges against the estate by the jurisdiction in which the estate was lawfully administered and this makes the requirement for their deduction before computing the Federal "Tax" peremptory.

THE STATUTORY PROVISION is that deduction shall be made of the amounts of all charges:

> "allowed by the laws of the jurisdiction . . . under which the estate is being administered."

This cause having been determined on demurrer all facts well-pleaded are taken as admitted. The facts thus in the Record include; (1) that the decedent here represented was domiciled in the STATE OF NEW YORK and the BOROUGH OF MANHATTAN in the COUNTY OF NEW YORK (*R. 3*), (2) that the SURROGATES' COURT OF NEW YORK COUNTY had jurisdiction over the administration of his estate (*R. 3, 4-5*), and (3) that this SURROGATES' COURT did allow the payments of STATE death duties, aggregating

$37,769.88, as charges against the principal of the estate (*R. 4-5*).

Hence it appears that *the terms defining the right to deduct*, to be found in Section 203, ***have been precisely met.*** The exact event, namely, the allowance of the charges in accordance with law, required to support the deduction, has been admitted to have occurred. The SURROGATES' COURT, being a court of competent jurisdiction, it is of course impossible, on this Record or in any proceeding similar to this, to question its determination as to the legality of the charges it has allowed. *So far, at least, as this proceeding is concerned its determination upon that point is final and not subject to attack.* Therefore, if Section 203 means what its language plainly inports, these death duties were proper deductions and should have been permitted by the defendant-in-error.

The only way to avoid the conclusion requiring such a deduction would be to contend that CONGRESS did not intend to permit the deduction of all items which the proper probate courts should allow, but only those which the COMMISSIONER OF INTERNAL REVENUE should consider that the probate courts ought to allow. This would be to establish a FEDERAL agency with appellate powers over the probate courts of the STATES, which is not permitted (*Uterhart* v. *United States*, *240 U. S. 598, 603*).

It is plainly necessary, moreover, to give full effect to the exact language of the statute, *i. e.*, to the words making allowance of charges by the proper tribunal of the STATE of domicile the test of the right to deduct.

> "It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of

the language it employed." *Montclair* v. *Ramsdell*, *107 U. S. 147, 152.*

Similarly:—

"To get at the thought or meaning expressed in a statute, . . . the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument must be accepted, . . . So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." *Lake County* v. *Rollins, 130 U. S. 662, 670-1.*

See also:—

United States v. *Gooding, 12 Wheat. 460, 477;*
Maillard v. *Lawrence, 16 How. 251, 261;*
United States v. *Isham, 17 Wall. 496, 505-6;*
Eyster v. *Centennial Board, 94 U. S. 500;*
Market v. *Hoffman, 101 U. S. 500;*
United States v. *Landram, 118 U. S. 81;*
American Net & Twine Co. v. *Worthington, 141 U. S. 468;*
Bernier v. *Bernier, 147 U. S. 242, 245;*
Stephens v. *Cherokee, 174 U. S. 445, 479;*
Murphy v. *Utter, 186 U. S. 95, 110;*
United States v. *McVeagh, 214 U. S. 124;*
Flint v. *Stone Tracy Co., 220 U. S. 107, 145;*
United States v. *Bennett, 232 U. S. 299, 302-3;*
United States v. *Standard Brewery, 251 U. S. 210, 217.*

Wholly aside from the principal proposition urged above, PLAINTIFFS-IN-ERROR are constrained to believe that the term "other charges" must include STATE death duties, because unless it has this reference it is impracticable to find that it has any general content. These words cannot be dismissed as surplusage, they must be given effect if any reasonable meaning can be found. The intendment suggested is apparently *the only intendment that could be assigned to them* and it is reasonably within their scope.

THIRD.

Congress intended to impose the tax in respect of only so much of decedents' estates as should pass to those beneficially entitled. Any other interpretation would result in profound inequality and injustice and should be avoided.

A TAX LEVIED UPON THE AMOUNT OF ANOTHER TAX shocks both the practical and the moral sense. No interpretation justifying such a secondary tax should be admitted if another and more reasonable interpretation is consistent with the language of the statute. The presumption against such an interpretation is at least as strong as that against the tax which was held to be uncollectible in *United States* v. *Goelet, 232 U. S. 293.* The tax involved in that case was imposed in respect of the use of foreign-built yachts owned or chartered by American citizens and was provided for by Section 37 of the TARIFF ACT OF 1909. GOELET was an AMERICAN citizen permanently domiciled in FRANCE and would have been liable to the tax (*Compare; Billings* v. *United States, 232 U. S. 261; United States* v. *Bennett, 232 U. S. 299, and United States* v. *Bennett, —— No. 2 ——, 232 U. S. 308, involving the same tax*), unless his foreign residence made the statute inapplicable. Although the words of the statute

were "any citizen" and there was no express reservation as to citizens permanently domiciled abroad, it was determined that the interpretation which would require payment in such a case would be *so unusual* that it could not be adopted in the absence of express language declaring the intent that the statute should have such effect. The following reference to *Goelet's case, supra,* is found in *Bennett's case, supra:*

> "But that ruling was based upon the proposition that as a taxing statute was usually confined to persons within the territorial jurisdiction of a taxing authority and to do otherwise would be exceptional, unless such a view was compelled by its terms, the statute here involved ought not to be construed as having been adopted to accomplish such unusual and strange results." *232 U. S. 299, 303.*

Now a *tax upon a tax,* even a Federal tax upon a State tax, is, it is respectfully submitted, even more "*unusual and strange*" than a tax in respect of citizens, or the income or property of citizens, permanently domiciled in foreign lands. Indeed, in *United States* v. *Goelet, supra,* it was possible to point (*232 U. S. 293, 297*) to an example of a tax (*13 Stat. 223, 281*) expressly extended to citizens domiciled abroad. It would be difficult indeed to point to any tax (prior to the revision made by the Act of February 24, 1919, of Sections 200 *et seq.* of the Act of September 8, 1916, and this exception will be considered hereinafter—*infra, 211*) expressly declared to be calculable in respect of some other tax.

The Court of Appeals of New York has found itself constrained to resort to construction rather than to subject an interest to death duties which would be obliged to respond to the same form of taxation in another State (*People* v. *Coleman, 135 N. Y. 231, 235*) or in a foreign

country (*Matter of James, 144 N. Y. 6, 11*). In the later case it was said that:—

> ". . . to hold otherwise might be to subject this estate to taxation both in Great Britain and in this State. Such a result of double taxation is one which the courts should incline to avoid, whenever it is possible, within reason, to do so." *144 N. Y. 6, 11.*

But another equally "unusual and strange" result was attributed by DEFENDANT-IN-ERROR to the Act under examination. The reasonable and practical effect commonly given to laws imposing death duties is that the computation of the amounts to be paid was intended to rest upon the value passing to beneficiaries. In other words, the rates of taxation are commonly applied to net values (subject, of course, to exemptions) which are eventually to pass to those beneficially interested in the estates affected. Any other construction would be palpably unjust, for whatever may be the legal theory of any tax of this character, it is manifestly true that the practical burden is always upon those who receive, those whose interests are in fact diminished. It was so held in *Randolph* v. *Craig, 267 Fed. 993, 995*, in which it was decided that the "gross estate," defined in Section 202 of the Act of September 8, 1916, was not intended to include the dower of the decedent's widow, and, under the transfer tax law of NEW YORK, in *Matter of Curtis, 142 N. Y. 219.*

> "It was never intended by the law to tax a theory having no real substance behind it. As was said in *Matter of Swift, 137 N. Y. 86*, the question of taxation is one of fact and cannot turn on theories or fictions . . . The law itself gives abundant evidence in its language of the intent to subject *only real and beneficial interests* to taxation, . . ." *142 N. Y. 219, 223.*

The amount of \$37,769.88 (*R. 4*) was diverted from the beneficiaries of the decedent here represented and passed, not to them, but to the six STATES in which the estate was obliged to pay death duties. This diversion reduced by \$37,769.88 the amount received by these beneficiaries, yet in respect of this reduction in the amounts they received, DEFENDANT-IN-ERROR claimed and collected an additional sum of \$1,888.49 (*R. 6*). Probably this result is *as unusual and strange as anything the most fantastic imagination in the field of taxation could conceive.*

TO PLAINTIFFS-IN-ERROR it seems that there are not only no words in the statute supporting this remarkable result but that the words actually used plainly indicate the purpose of CONGRESS to the contrary. That is, they deem that the statute clearly expresses the intent commonly found in statutes imposing death duties, to apply the tax to no greater amount than that to be distributed to beneficiaries.

It has been so held by the CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT in *Lederer* v. *Pearce, 266 Fed. 497*, a case arising under the law here in question. The opinion says:

> "From the form of the FEDERAL ESTATE TAX ACT, it is evident the CONGRESS intended that the Act should operate not in opposition to but in harmony with the many different STATE Acts with which, because of its very terms, it would come into contact. Therefore in creating an estate tax, the Congress very wisely leveled the tax at that property of decedents which is subject to distribution as part of their estates. . . ." *266 Fed. 497, 499.*

The intention stated in the foregoing is believed to be found in (1) the evident care with which the list of items

excepted from the taxable estate was prepared and (2) the addition, at the end of that list, of a general or "blanket" clause apparently considered sufficient to cover all other items that would have to be deducted before distribution. The list of excepted items found in Section 203 is as follows:

1. "Funeral expenses,"

2. "Administration expenses,"

3. "Claims against the estate,"

4. "Unpaid mortgages,"

5. "Losses incurred during the settlement of the estate, arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise."

6. "Support during the settlement of the estate for those dependent upon the decedent," and

7. "Such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered."

It would seem that the foregoing list was plainly intended to include everything not passing to the beneficiaries. *The seventh item is a general clause for the purpose of gathering in any deduction or diversion from the total value passing to the beneficiaries which might not be included in any of the six more specific items.* Without such a clause, death duties might have been deductible as expenses of administration or as claims against the estates, but with such a clause the right to the deduction does not appear doubtful. Such was the view taken in *Northern Trust Company* v. *Lederer* (*D. C.*), *257 Fed.*

812; affirmed, 262 Fed. 52; certiorari denied, 253 U. S. 487, the Court saying:—

> "Under the decisions, it is deductible either as an administration expense, or as a claim against the estate, or, if the right of the executors to deduct it before payment of the Federal tax were doubtful under these items, the deductions allowed under the law as 'such other charges against the estate as are allowed by the laws of the jurisdiction under which the estate is being administered,' broadly and entirely include it." *257 Fed. 812,* .

Serious inequality and grave injustice would follow from the construction urged by DEFENDANT-IN-ERROR, by reason of the wide diversity in the rates of the death duties exacted by different STATES. This may readily be illustrated, as follows:

Example 1. The estate of a resident of New Jersey leaving property in that State worth $1,675,000.00, in excess of expenses and claims, to a stranger-in-blood, would pay, to the State, a death duty of $77,-900.00. With no deduction for the State tax, the Federal exaction, at the rates of the Act of September 8, 1916, would be $78,500.00 or 4.92 per cent on the total which the State of New Jersey would permit to pass to the beneficiary.

Example 2. An estate of the same amount as that illustrated in *Example 1,* located in California and left in the same way by a resident of California, would pay, to that State, $458,725.00. Computing the Federal tax without deduction for the State tax, at the 1916 rates, the amount, $78,500.00, would be 6.45 per cent of the total which the State of California would permit to pass to the beneficiary.

Example 3. If the estate of the California decedent illustrated in *Example 2* consisted of stock in a Missouri corporation, death duties would be paid in both States. California would exact $458,725.00 and Missouri would exact $465,500.00, a total of $924,-225.00. Still computing the Federal tax in the manner adopted by defendant-in-error, that exaction would be $78,500.00 or 10.46 per cent of the amount left after the exercise of State power to regulate descent and distribution.

The disparities illustrated approximate the grotesque* and it is true that they are somewhat enhanced (above the average inequalities that would result from the same cause) because of the selection, for illustrative purposes, of estates passing to strangers-in-blood to the decedents, estates so passing being commonly subjected to higher death duties. But the vice of such inequalities is intrinsic and does not depend upon their extent. Their monstrous character may well be illustrated by instances, always liable to occur in actual practice, could the interpretation applied by defendant-in-error be sustained, in which they approach their maxima, but it is not absent when the actual differences thus caused are at their minimum. No statute should be construed so as to produce such "unusual and strange" results (*United States* v. *Bennett, supra, 191*) and, if it were necessary, the avoidance of such injustice would require resort to construction if any other meaning could be found within the terms of the enactment. This principle has already been ap-

*At the rates of the Act of Congress of March 3, 1917, the Federal exaction would have been $117,750.00 or, in the three successive examples, 7.37, 9.68 and 15.68 per cent of the respective amounts not diverted from the beneficiary by State power; at the rates of October 3, 1917, $157,000.00 or 9.83, 12.91 and 20.91 per cent, respectively, and at the present rates, $116,500.00 or 7.29, 9.58 and 15.52 per cent, respectively.

plied in interpreting a FEDERAL statute imposing death duties.

> "We are, therefore, bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality or injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute." *Knowlton v. Moore, 178 U. S 41, 77, and cases there cited.*

The statement of the same principle in *Stratton's Independence v. Howbert, 231 U. S. 399*, a case under the CORPORATION TAX ACT, of August 5, 1909, may well be quoted. Mr. JUSTICE PITNEY, for the majority of this COURT, said:—

> "Of course, if it were demonstrable that to read the Act according to its letter would render it unconstitutional, or glaringly unequal, or palpably unjust, a reasonable ground would exist for construing it according to its spirit rather than its letter." *231 U. S. 399, 414.*

See, also, the decision rendered, by this COURT, on February 28, 1921, in *Baender v. Barnett*, and especially the extract from *United States v. Kirby, 7 Wall. 482, 486*, therein contained.

Still another reason for considering that the FEDERAL tax was intended to apply only to the total available for distribution to the beneficiaries is found in the terms in which the lien for the tax is provided. This provision is contained in Section 209, the first paragraph of which reads as follows:—

> "SEC. 209. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross

estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien."

Obviously, if the foregoing could be construed as a solitary and separate provision, independently of the balance of the Act, the application of the lien might be considered to be much broader than the net estate remaining after making the deductions provided for by Section 203. But it is at least equally obvious that the elementary principle, that every act is to be construed as an entirety, is applicable and it must be, therefore, that the lien was intended to attach only to the property in respect of which the tax was to be computed, plus, it is presumed, the exemption of $50,000.00. On any other interpretation, the lien might attach to, at least, (1) the amounts used to discharge "unpaid mortgages," and to amounts expended for "support during the settlement of the estate of those dependent upon the decedent," as well as to the amounts taken by the States as death duties. But it is unthinkable that CONGRESS could have intended to place a lien upon moneys collected by the STATES in the exercise either of their powers of taxation or their authority to regulate descent and distribution. Whether such a lien could be maintained presents a CONSTITUTIONAL question of the gravest character which need not be discussed at this time, as the mere existence of such a question impels to the avoidance, wherever possible, of the construction from which it results.

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubt upon that score." *United States* v. *Jin Fuey Moy, 241 U. S. 394, 401; quoted, United States* v. *Standard Brew-*

ery, 251 U. S. 210, 220; quoted, Baender v. *Barnett, —— U. S. ——, decided on February 28, 1921.*

Evidently Sections 203 and 209 were intended to exclude the same items from (1) the computation of the tax and (2) the lien for the tax, and both were intended to exclude STATE death duties, *i. e.*, amounts diverted prior to the settlement of the total to be actually distributed to the beneficiaries.

FOURTH.

If the right to deduct the New York Transfer Tax is to be determined by the special character of that tax it will be found to be a necessary deduction, but it is not possible to believe that Congress intended that Section 203 should be so narrow as to require minute inquiry concerning the theoretical character of the death duties of more than forty States, thus varying the practical results of the tax in different regions and permitting the deduction to certain estates and forbidding it to others.

UNLESS THE FOREGOING PROPOSITION IS SOUND the geographical uniformity in FEDERAL taxation required, except as to direct taxes, by the CONSTITUTION will have *disappeared in practice, although it may still seem to be found in the letter of the law.* Even more than this, if the rule as to deduction of STATE death duties is to vary from STATE to STATE, in accordance with the theory which each has seen fit to apply in imposing such duties, every STATE statute on the subject is, in effect if not in juridicial theory, read into the FEDERAL statute and, thus, it might become *seriously questionable whether even the letter of geographical uniformity had been preserved.*

The plain propriety of a rule of general application as to deductions was apparently recognized by the TREAS-

URY DEPARTMENT in the original declaration that all STATE death duties were deductible, issued on November 17, 1916 (*supra, 183*), and, also, in the subsequent declaration, issued on September 10, 1917 (*supra, 182*), that the original interpretation was wrong and that the construction relied upon by defendant-in-error should be substituted. But after the denial by this COURT (*253 U. S. 487*) of the application for a *writ of certiorari* to review the decision of the CIRCUIT COURT OF APPEALS in *Lederer v. Northern Trust Company, 262 Fed. 52*, this simplicity and uniformity could be restored only by reverting to the view originally held by the TREASURY DEPARTMENT (*supra, 183*). This course was not adopted by the GOVERNMENT and the present situation as to the estates of persons dying between September 9, 1916, and February 24, 1919, both dates included, is that death duties of the STATE OF PENNSYLVANIA are permitted to be deducted while those of all other STATES are required to be included in the amounts on which the FEDERAL exaction is computed (*See Treasury Decision, 3,027, issued on June 2, 1920*). This singular and apparently inequitable discrimination was brought to an end by the REVENUE ACT OF 1918, applicable to the estates of persons dying on and after February 25, 1919, which in terms prohibits the deduction of STATE death duties (*The effect of this express prohibition upon the question of interpretation is discussed at another point in this brief, infra, 211*).

Sustaining, in another case, *Sayre v. Brewster, 268 Fed. 553*, the view now urged by PLAINTIFFS-IN-ERROR, JUDGE RAY, of the DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, said:

> "The State of New York had the right to impose the tax it did impose on this estate, acting through its Surrogate's Court, which was and is the Court

of competent jurisdiction. When that tax was imposed it became a charge upon and against the estate and this fact is clearly recognized by the Act of Congress above referred to. It was not the policy or purpose of Congress to impose a tax upon the amount of a tax already paid from the estate of a decedent or to the State in which such estate is being administered." *268 Fed. 553, 557.*

The quality of NEW YORK death duties was in issue in this COURT in *United States* v. *Perkins, 163 U. S. 625*, a case in which it was necessary to determine whether the STATE transfer tax in respect of decedents' estates could be enforced as to a legacy to the UNITED STATES. The considerations upon which it was held that the tax could be collected seem absolutely at variance with any theory that it is not a charge upon the estate. MR. JUSTICE BROWN, for the majority of the COURT, MR. JUSTICE HARLAN alone dissenting, said:

> ". . . we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good.
>
> "In this view, the so-called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of it shall remain, but subject to a condition that the State has a right to impose . . . Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee." *163 U. S. 625, 628.*

And, further:—

". . . the Act in question is not open to the objection that it is an attempt to tax the property of the United States, . . . The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it." *163 U. S. 625, 630.*

The case from the decision in which the foregoing extracts have been made, was in this COURT on writ of error to review the judgment of the COURT OF APPEALS OF NEW YORK, the proceeding in that COURT being *Matter of Merriam, 141 N. Y. 479.* JUDGE BARTLETT, delivering the opinion of that COURT, said:

"This tax, in effect, limits the right of testamentary disposition, . . . The property which vests in the United States under this will is the net amount of its legacy after the tax is paid." *141 N. Y. 479, 484; affirmed, 163 U. S. 625.*

In *Matter of Watson, 226 N. Y. 384,* decided on May 20, 1919, one of the latest cases under the transfer tax law of the STATE heard by the COURT OF APPEALS OF NEW YORK, the judgment upheld an additional transfer tax (*Laws of New York, 1917, ch. 700*) imposed on bonds held in estates in cases in which the STATE investment tax had not been paid prior to the death of the owner. The doctrine of *Matter of Merriam, supra,* was reasserted, JUDGE CRANE, for the COURT, saying:—

"The beneficiary has no claim to the property of an ancestor except as given by law, and, if the State has a right to impose a tax at all upon the passing of property, the transferee takes only what is left after the tax is paid." *226 N. Y. 384, 399.*

So, also, in *Matter of Josephine Penfold, 216 N. Y. 163,* decided by the COURT OF APPEALS in 1915, it was said:—

> "The tax (so-called) is the toll or impost appropriated to itself by the State for or in connection with the right of succession to property. It accrues, therefore, at the same time that the estate vests, that is upon the death of the decedent." *216 N. Y. 163, 167.*

Following the foregoing, the COURT quoted from its opinion in *Matter of Swift, 137 N. Y. 77, 83,* in order to say:

> "What has the State done, in effect, by the enactment of this tax law? It reaches out and appropriates for its use a portion of the property at the moment of its owner's decease; allowing only the balance to pass in the way directed by the testator, or permitted by its intestate law." *216 N. Y. 163, 167.*

In another transfer tax case the COURT OF APPEALS said:

> "The property disposed of . . . to enable the executor or administrator to pay the transfer tax or the decedent's debts is not a part of the property transferred within the meaning of such provision and is free from the tax and its lien." *Matter of Meyer, 209 N. Y. 386, 391.*

See, also:

Matter of Zborowski, 213 N. Y. 109, 111-2;
Matter of White, 208 N. Y. 64, 67;
Matter of Delano, 176 N. Y. 486, 495;
Matter of Dows, 167 N. Y. 227, 230, 232;
Matter of Sherman, 153 N. Y. 1, 3;

> *Matter of Hamilton*, 148 N. Y. 310, 313, 315;
> *Matter of Cullom*, 145 N. Y. 593;
> *Matter of Swift*, 137 N. Y. 77, 82.

The character of the NEW YORK transfer tax is a question of STATE law to be determined by the courts of the STATE.

> *Moffitt* v. *Kelly*, 218 U. S. 400, 404-6;
> *Marshall* v. *People*, — U. S. —; decided on December 20, 1920.

United States v. *Perkins*, *supra*, has been repeatedly cited in subsequent cases involving death duties:

See:

> *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 290-1;
> *Knowlton* v. *Moore*, 178 U. S. 41, 54;
> *Plummer* v. *Coler*, 178 U. S. 115, 129-130, 132, 133, 137;
> *Cahen* v. *Brewster*, 203 U. S. 543, 550-1;
> *Keeney* v. *New York*, 222 U. S. 525, 533;
> *Peterson* v. *Iowa*, 245 U. S. 170, 175.

In *Plummer* v. *Coler*, *supra*, it was decided that the NEW YORK transfer tax could be enforced in respect of a legacy of UNITED STATES bonds to trustees who were directed to pay the income currently to the testator's daughter during her life and to divide the principal among her issue upon her decease. Referring to *United States* v. *Perkins*, *supra*, and to the NEW YORK statute imposing death duties, the majority opinion, says:

> ". . . the statute in question distinctly makes it the duty of the executor to pay the amount before the legacy passes to the legatee." *178 U. S. 115, 132.*

The death duties imposed by the STATE OF NEW YORK were treated, in *Tilt* v. *Kelsey, 207 U. S. 43*, as claims against the estate of a decedent. As such they were held to be barred by a decree of final distribution of a NEW JERSEY court, having authority under NEW JERSEY law to enter such a decree, the will having been probated in that court and administration completed under its control, even though the question whether decedent's domicile was in NEW JERSEY or in NEW YORK was in dispute and was regarded as one on which the latter STATE was not concluded by the determination of the former. The majority opinion, by MR. JUSTICE MOODY, MR. JUSTICE HARLAN alone dissenting, says:—

> ". . . the jurisdiction to direct a final distribution means a distribution which shall be final, so far, at least, as any person having a demand against the estate is concerned. If we have discerned correctly the effect which New Jersey gives to these judicial proceedings, it is obvious that the assessment of this tax denies them full faith and credit in two respects: First, in seeking a part of an estate which has been finally distributed to those who were entitled to it under the will; and, second, in fixing a personal responsibility for the tax upon the executors who had been conclusively exonerated from such a liability." *207 U. S. 43, 58-9.*

The CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT examined the NEW YORK statutes and decisions in the recent case of *Prentiss* v. *Eisner, 267 Fed. 16 (affirming, 260 Fed. 589)*, and *writ of certiorari* to review its conclusions was denied by this COURT, on October 25, 1920 (— *U. S.* —). In that case the COLLECTOR OF INTERNAL REVENUE was sued to recover an amount paid under protest as FEDERAL income tax, the ground for recovery suggested being that the income on which the tax

was computed had not been permitted to be diminished by the deduction of a NEW YORK death duty exacted within the year in respect of an inheritance which had passed to the plaintiff. It appeared that the COMMISSIONER OF INTERNAL REVENUE had ruled that:—

> "A collateral inheritance tax levied under the laws of the State of New York, being, as it is, a charge against the *corpus* of the estate, does not constitute such an item as can be allowed as a deduction in computing income tax liability to either the estate or the beneficiary thereof." *267 Fed. 16, 17.*

Both the DISTRICT COURT and the CIRCUIT COURT OF APPEALS approved the foregoing and the judgment has become final by the denial of a writ of certiorari by this COURT (*supra, 205*). The opinion of the CIRCUIT COURT OF APPEALS includes the following:

> "Now a succession tax is a tax upon a transfer of property in general and as such is distinguishable from a legacy duty, which is a tax upon a specific bequest. Under the New York law the succession tax creates a lien upon the estate of the decedent at the moment of his death. The right of the State to the amount of this lien attaches at that time and it must be paid before the transferee gets anything, and the executor or administrator is personally liable for the tax until it has been paid. Under such a law we do not see that the transferee pays the tax." *267 Fed. 16, 21.*

And:—

> "The legacy which the plaintiff herein received under the will of her father did not become her property until after it had suffered a diminution to the amount of the tax, and the tax that was paid thereon was not a tax paid out of the plaintiff's in-

> dividual estate but was a payment out of the estate of her deceased father. . . ." *267 Fed. 16, 21-2.*

Thus it appears that, if the question now under examination is to be determined upon the quality of the New York death duties, the ruling of the Commissioner of Internal Revenue last above quoted (*supra, 206*), to the effect that such duties are charges against the estate, and against the corpus of the estate, is to be preferred to his *directly opposite ruling*, of September 10, 1917 (*supra, 182*), which is contested herein. Both of these contradictory rulings cannot be right; that approved by the Circuit Court of Appeals (*supra, 206*) appears to be correct.

It seems necessary to apply to the ruling of 1917, which reversed that of 1916, the words used by the Circuit Court of Appeals for the Seventh Circuit, with relation to another ruling (also reversing a former and more liberal ruling) by the same authority.

> "This ruling . . . illustrates the not unnatural tendency of tax officers to increase the revenues by implications and strained constructions. The Department's first rulings were in harmony with the natural import of the language used by Congress; its later rule does more than violate the canon that doubts and ambiguities are to go against the Government, for it is based not upon any uncertainty in the terms of the Act, . . ." *First Trust and Savings Bank* v. *Smietanka, 268 Fed. 230, 233.*

Not only is the foregoing believed to be correct with respect to the death duties imposed by the State of New York, but it is believed to be equally true with regard to all State exactions of this character. And on this point another general ruling by the Treasury Department is

considered significant, although it is plainly in conflict with the ruling of September 10, 1917 (*supra, 182*), relied upon by defendant-in-error in this proceeding. Article 134, of Regulations 45, issued by the COMMISSIONER OF INTERNAL REVENUE in 1919, is, in part, as follows:—

> *Art. 134. Inheritance Taxes* . . . Since, moreover, the tax is imposed upon the transfer before the property reaches the legatee or distributee, and merely diminishes the capital share of the estate received by him, such tax is not imposed upon the legatee or distributee and is not an allowable deduction from his income." *p. 57.*

If STATE death duties are not taxes paid by the beneficiaries it would seem to follow that they must be "charges against the estate," within the meaning of Section 203 of the Act of September 8, 1916. They are burdens that must rest somewhere; they are real and substantial; often, as has been seen, running to huge amounts. They are not recovered out of the circumambient atmosphere, they are paid from some source capable of making payment. They are evidently not paid, in legal effect, by the beneficiaries, for if they were a legacy to the UNITED STATES could not be taxed and *United States* v. *Perkins*, *163 U. S. 625* (*supra, 201-2*), would have been differently decided.

FIFTH.

Death duties paid in States other than the State of domicile are paid in respect of the universal succession of personal representatives and must, therefore, be charges against the estate, within the meaning of Section 203.

THE DECEDENT HERE REPRESENTED had his domicile in the STATE OF NEW YORK. But in addition to the death

duty exacted by that STATE his estate paid death duties in five STATES (*R. 4*), as follows:

New Jersey,	$2,396.88
Michigan,	292.14
Kansas,	1,409.95
Wisconsin,	602.16
Colorado,	80.00
	$4,781.13

The refusal of defendant-in-error to permit the deduction of the above $4,781.13, irrespective of his refusal to permit the deduction of the larger death duty paid to the STATE OF NEW YORK, increased the amount exacted from plaintiffs-in-error by the sum of $239.06.

It will probably be admitted that the legal basis of death duties paid to STATES other than the STATE of domicile differs materially from that of such duties paid at the domicile. One STATE taxes the universal succession, the other taxes the singular succession (*infra, 210*). A tax in respect of the transfer to executors or administrators is so directly a charge upon the estate, and therefore expressly designated among the deductions admitted by Section 203, as to make discussion unnecessary. In order to reach interests in estates of non-resident decedents the STATE OF NEW JERSEY, which exacted a considerable tax from this estate, places a tax upon this universal succession as to property within its dominion. That this is the character of the NEW JERSEY tax was decided in *Maxwell* v. *Bugbee, 250 U. S. 525*, citing *Carr* v. *Edwards, 84 N. J. L. 667*.

"The tax is, then, one upon the transfer of property in New Jersey, to be paid upon turning it over to the administrator or executor at the domicile of

the decedent. That transfers of this nature are within the taxing power of the State, and that taxes may be assessed upon such rights owing their existence to local laws, and to them alone, is not disputed." *250 U. S. 525, 536.*

The foregoing follows an earlier declaration to the same effect in *Blackstone* v. *Miller, 188 U. S. 189.*

> "The fact that two States dealing each with its own law of succession, both of which the plaintiff-in-error has to invoke for her rights, have taxed the right which they respectively confer, gives no cause for complaint on constitutional grounds . . . The universal succession is taxed in one State, the singular succession is taxed in another." *188 U. S. 189, 206-7.*

It would appear clearly to follow that all death duties paid outside the STATE of domicile must be, in every sense, "charges against the estate."

> "The only reason, therefore, for the executors paying the tax was the necessity of getting control of the property. Under the common law such a charge was proper as an expense of administration." *Bullard* v. *Redwood Library, 37 R. I. 107, 113-5, 119.*

See, also:

Corbin v. *Townshend, 92 Conn. 501, 506;*
Callahan v. *Woodbridge, 171 Mass. 595, 597;*
Greves v. *Shaw, 173 Mass. 205, 209-210;*
Kingsburg v. *Bayeley, 75 N. H. 13, 18;*
Orcutt's Appeal, 97 Pa. St. 179;
Coleman's Estate, 159 Pa. St. 231, 233;
Lewis' Estate, 203 Pa. St. 211, 215;
Van Beil's Estate, 257 Pa. St. 155, 156.

SIXTH.

The enactment, as part of the "Revenue Act of 1918," of an express prohibition of deductions of the sort here claimed indicates that Congress considered that the previous Statute, which is now before the Court permitted the deduction.

The Revenue Act of 1918, enacted on February 24, 1919 (*40 Stat. 1057*) substituted for Section 203, the interpretation of which is here in question, a new section which is Section 403 of the present law. Portions of these sections are printed below in parallel columns, all words added or omitted in the revision being in capitals, so that the changes will readily appear:

SECTION 203.

(*September* 8, 1916, *to February* 24, 1919.)

"Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate, arising from fires, storms, shipwreck, or other casualty, AND from theft, when such losses are not compensated for by insurance or otherwise,

support during the settlement of the estate of those dependent upon the decedent, AND SUCH OTHER CHARGES AGAINST THE ESTATE, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered;

(*Words in capitals were omitted by the revision.*)

SECTION 403.

(*February* 25, 1919, *to*——).

"Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, OR from theft, when such losses are not compensated for by insurance or otherwise, AND SUCH AMOUNTS REASONABLY REQUIRED AND ACTUALLY EXPENDED FOR THE support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, BUT NOT INCLUDING ANY INCOME TAXES UPON INCOME RECEIVED AFTER THE DEATH OF THE DECEDENT, OR ANY ESTATE, SUCCESSION, LEGACY OR INHERITANCE TAXES;

(*Words in capitals were added by the revision.*)

It will be seen that, in the revision, CONGRESS *omitted the provision on which plaintiffs-in-error rely* as to the question of interpretation, *i. e.*, the clause directing the deduction of "other charges" and *added an express prohibition against the deductions which the omitted provision is claimed to have authorized.* Such a change in the language of a statute is evidence of a purpose to alter the substance of the law. It justifies the belief that CONGRESS considered that the original form of the section required the deductions which the new form prohibits.

> "Those words were carefully omitted. . . . From this and a comparison of the acts in other particulars it is apparent that Congress in the later act departed from its prior practice . . ." *Cole* v. *Ralph, 252 U. S. 286, 294.*

Concerning another change in the language of the law, with regard to this exaction, attempted by the revision of 1919, the effort to bring property affected by general powers of appointment within the scope of the tax, JUDGE DICKINSON, in the DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, has said:—

> ". . . the declaration of Congress is that we did not tax property of this kind by the Act of 1916, but we do now tax it by the Act of 1919." *Pearce* v. *Lederer, 262 Fed. 993, 995.*

And see the decision of this COURT, rendered on February 28, 1921, in *United States* v. *Field.*

The same principle of statutory interpretation was applied in NEW JERSEY, in *Dixon* v. *Russell, 79 N. J. L. 490,* a case arising in connection with death duties imposed by that STATE. CHIEF JUSTICE GUMMERE, for the COURT said:—

> "The amendment itself, we think, shows that the

Legislature appreciated that the distinction existed, for it is not to be supposed that this body went through the form of amending a statute without understanding that by doing so a change in the character of the legislation would be accomplished." *79 N. J. L. 490, 493.*

See, also:

Plunkett v. *Old Colony Trust Co., 233 Mass. 471, 474;*
Matter of Miller, 110 N. Y. 216;
Matter of Euston, 113 N. Y. 173, 183;
Matter of Romaine, 127 N. Y. 80, 84;
Matter of Hoffman, 143 N. Y. 327, 331;
Matter of Harbeck, 161 N. Y. 211, 218.

SEVENTH.

The diversion to a State of part of the property of estates by means of death duties is pro tanto a denial of the right or privilege to transmit from the dead to the living and Congress is without power to impose a tax in respect of the denial of any privilege.

IT HAS BEEN SHOWN (*supra, 209*) that death duties exacted by STATES other than the STATE of domicile of the decedent whose estate they affect, are exacted in respect of the universal succession of the personal representatives. Such death duties plainly, therefore, diminish before distribution, the total available for distribution, and amount to a diversion to the STATE of portions of the estate affected. The portions thus diverted are not permitted to pass to the next of kin or legatees of the decedent. *As to these portions the right to transmit or to receive by testate or intestate succession is denied* by

the power, that is by the STATE, which can grant, regulate, limit or withhold that right.

> "This State was not bound to permit a foreign executor to succeed to New Jersey property; we might impose such limitations as we choose, . . ." *Senff* v. *Edwards, 85 N. J. L. 66, 69-70.*

The other side of this picture is that presented to the STATE of domicile. Holding that death duties imposed by other STATES are proper charges as expenses of administration under the laws of NEW HAMPSHIRE, the SUPREME COURT of that STATE said:—

> "To hold that the effect of the foreign law is to reduce the legacy given by the will construed in accordance with the law of the testator's domicile is to permit the foreign law to regulate the testamentary capacity of a citizen of this State . . . Whatever sums the executor may be obliged to pay to bring the property within the State merely reduce the amount within the control of the Court . . . A deduction from a legacy on account of a tax imposed on others in a particular jurisdiction would not be supported by any basis of reason." *Kingsbury* v. *Bayeley, 75 N. H. 13, 17-8.*

See also:—

> *Blackstone* v. *Miller, 188 U. S. 189;*
> *Maxwell* v. *Bugbee, 250 U. S. 525.*

It has also been shown that the death duties imposed by the STATE OF NEW YORK (*supra, 45, 201-8*) and the STATE OF MISSOURI (*supra, 44*), with reference to estates of their own citizens, are exacted in the exercise of the power to regulate descent and distribution. To the ex-

tent, therefore, that these STATES by their death duties divert portions of estates to their own treasuries, instead of permitting such portions to be disposed of by will or to be transmitted to the next of kin without a will, *there is denial of the privilege which the* STATES *alone can bestow or withhold.*

In NEW JERSEY, which exacted a considerable tax from the estate here represented (*R. 4*), death duties are imposed in the exercise of the power to regulate descent and distribution. In *Howell* v. *Edwards, 88 N. J. L. 134*, decided by the SUPREME COURT OF NEW JERSEY, it was said (*quoting, Neilson* v. *Russell, 76 N. J. L. 27*):

> ". . . the impost we are considering . . . is a premium or privilege upon the devolution of property—in fine, a succession tax, and . . . as such it rests fundamentally upon the sovereign right of a State to withhold, and hence to limit the right of testamentary disposition or of intestate succession." *88 N. J. L. 134, 136.*

In NEW HAMPSHIRE death duties are supported, the reference being to property situated out of the STATE but belonging to a resident decedent, as follows:

> "As the property is deemed to be here so as to be controlled by our laws in its devolution, those who acquire title to it, through the operation of our laws relating to the estates of deceased persons, must take the benefits charged with the burdens imposed by those laws." *Mann* v. *Carter, 74 N. H. 345, 352.*

The SUPREME COURT OF MONTANA, sustaining the death duties imposed in that STATE, in *Gelsthorpe* v. *Furnell, 41 Mont. 351*, quoted *State* v. *Dalrymple, 70 Md. 294*, as follows:—

> "The intention of the Legislature was to exact

a certain premium for the enjoyment of a civil right secured under the laws of succession. The reasoning of the many cases upholding such laws proceeds upon the indisputable proposition that the State has the power—unless denied it by constitutional prohibition—to regulate the devolution and distribution of an intestate's property, and equal authority to limit the power of a testator to bequeath the property to whom he pleases." *70 Md. 294; quoted, 20 Mont. 299, 304.*

The Maryland case, thus relied upon by the Montana court, contained, also, the following:—

"There can be no doubt that the Legislature has the power to impose it . . . We may add that our statutes abolishing primogeniture and directing the descent of real estate, and those regulating the distribution of personal property, and respectively designating who shall inherit the one and who shall take the other, and former enactments now repealed, prohibiting aliens from acquiring property in this State, except upon compliance with the conditions imposed, are instances of the exercise of the same power." *70 Md. 294, 298-9.*

Illinois imposes death duties which are thus explained by its highest court:—

"The Legislature having the undoubted power to regulate the subject of the devolution of property, may by enacting a law for that purpose, provide that a certain portion of a decedent's property shall vest in the State. This, in effect, has been accomplished by what is known as our Inheritance Tax law . . . The State acquires title to its portion of the estate immediately upon the death of the owner. That portion of the estate which under the

Inheritance Tax law vests in the State by mere operation of law becomes severed from the remainder of the estate and cannot pass either by descent or devise." *Northern Trust Company* v. *Buck & Rayner, 263 Ill. 222, 230.*

In CONNECTICUT such exactions are "not taxes in any ue sense" (*Warner* v. *Corbin, 91 Conn. 532, 536*), and e law imposing them "affects the law of distribution" *lopkin's Appeal, 77 Conn. 644*). They are:—

". . . levied as exactions of the State in the course of the settlement of estates and as incidental to the devolution of title by force of its laws." *Corbin* v. *Baldwin, 92 Conn. 99, 103.*

The CALIFORNIA law establishing death duties was exunded in *Estate of Leland Stanford, 126 Calif. 112,* as llows:—

"It is only in virtue of the statute that an heir is entitled to receive any of his ancestor's estate; and the Legislature can provide that the whole or only a portion shall go to the heirs or other beneficiaries upon the death of the ancestor. This being so, and the Legislature having determined that ninety-five per cent of the decedent's estate may go to his heirs and beneficiaries, and that five per cent can be retained by the State, it is too clear for argument that this five per cent vested in the State at the same time that the ninety-five per cent vested in the heirs or other beneficiaries . . . This is property or a thing of value belonging to the State." *126 Calif. 112, 118-9; See, Estate of Martin, 153 Calif. 225, 227-8.*

See other State decisions to same effect (*supra, 44-9*).

Taxation which must rest upon the exercise of some it or privilege (*supra, 142-151*), which privilege

"must exist" (*Nicol* v. *Ames, 173 U. S. 509, 521*) and be actively utilized (*McCoach* v. *Minehill & Schuylkill Haven Railway, 228 U. S. 295, 305; Billings* v. *United States, 232 U. S. 261, 280*), in order that the right to tax may come into existence, *can scarcely be applied to the denial of a privilege.* The UNITED STATES have power to impose death duties, *properly levied and measured,* when the right to inherit or succeed to property exists under STATE law and is exercised by an heir, devisee, distributee or legatee (*Scholey* v. *Rew, 23 Wall. 331; Knowlton* v. *Moore, 178 U. S. 41*). But this is a very different thing from imposing a tax upon property an interest in which "ceased by reason of the death" (*Knowlton* v. *Moore, 178 U. S. 41, 77*) of a citizen of a STATE when that STATE denied to such citizen the right to transmit and by such denial, denied to all persons, wherever located, the right to receive. In such case, the STATE having exercised dominion over the citizen and over property within its territorial jurisdiction, has withdrawn a portion of such property from the estate of the decedent and appropriated it for its own use. Property thus appropriated has passed beyond the reach of FEDERAL taxation and *there is no exercise of any right or privilege* that could suffice to support an excise tax in any form. To construe the law now under scrutiny so as to include the amounts of STATE death duties in the basis on which the "tax" is computed would seem to render it UNCONSTITUTIONAL AND VOID, irrespective of the CONSTITUTIONAL objections urged in the first section of this brief. Not only should a statute be so construed, if possible, as to render it consistent with the CONSTITUTION, but, also, so as to avoid grave CONSTITUTIONAL doubts.

> *Presser* v. *People, 116 U. S. 252;*
> *Knights Templars' & Masons' Life Indemnity Co.* v. *Jarman, 187 U. S. 197, 205;*

Harriman v. *Interstate Commerce Commission*, *211 U. S. 407, 422;*

United States v. *Delaware & Hudson Co., 213 U. S. 366, 407;*

The Abby Dodge v. *United States, 223 U. S. 166, 175;*

Stratton's Independence v. *Howbert, 231 U. S. 399, 414;*

United States v. *Bennett, 232 U. S. 299, 303-4;*

United States v. *Standard Brewery, 251 U. S. 210, 220.*

Baender v. *Barnett, — U. S. —, decided on February 28, 1921.*

On all the foregoing grounds it is submitted that Section 203 should be interpreted so as to require the deduction of all death duties exacted by State authority.

V.

THIS IS AN APPROPRIATE ACTION FOR THE RECOVERY SOUGHT.

Suit against the Collector of Internal Revenue who made an unlawful exaction, claiming authority under an Act of Congress, is a proper method of obtaining relief (*Philadelphia* v. *Collector, 5 Wall. 720, 731; Patton* v. *Brady, 184 U. S. 608, 614; United States* v. *Emery, Bird, Thayer Realty Co., 237 U. S. 28, 31*), and this is a proper case for direct appeal to this Court from the District Court (*Towne* v. *Eisner, 245 U. S. 418, 425; Southern Pacific Co.* v. *Lowe, 247 U. S. 330*).

VI.

CONCLUSION.

THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, sustaining the demurrer to the complaint, should be reversed and the cause remanded with direction to overrule the demurrer.

All which is respectfully submitted.

FRANCIS J. MCLOUGHLIN,
Attorney for Plaintiffs-in-Error.

GEORGE SUTHERLAND,
H. T. NEWCOMB,
Of Counsel.

APPENDIX.

"ESTATE TAX" PROVISIONS OF THE ACT OF SEPTEMBER 8, 1916.

(*39 Stat. 756, 777*)

Title II.—Estate Tax.

Sec. 200. That when used in this title—

The term "person" includes partnerships, corporations, and associations;

The term "United States" means only the States, the Territories of Alaska and Hawaii, and the District of Columbia;

The term "executor" means the executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession of any property of the decedent; and

The term "collector" means the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death, or, if there was no such domicile in the United States, then the collector of the district in which is situated the part of the gross estate of the decedent in the United States, or, if such part of the gross estate is situated in more than one district, then the collector of internal revenue at Baltimore, Maryland.

Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

One per centum of the amount of such net estate not in excess of $50,000;

Two per centum of the amount by which such net estate exceeds $50,000 and does not exceed $150,000;

Three per centum of the amount by which such net estate exceeds $150,000 and does not exceed $250,000;

Four per centum of the amount by which such net estate exceeds $250,000 and does not exceed $450,000;

Five per centum of the amount by which such net estate exceeds $450,000 and does not exceed $1,000,000;

Six per centum of the amount by which such net estate exceeds $1,000,000 and does not exceed $2,000,000;

Seven per centum of the amount by which such net estate exceeds $2,000,000 and does not exceed $3,000,000;

Eight per centum of the amount by which such net estate exceeds $3,000,000 and does not exceed $4,000,000;

Nine per centum of the amount by which such net estate exceeds $4,000,000 and does not exceed $5,000,000; and

Ten per centum of the amount by which such net estate exceeds $5,000,000.

SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature

of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; and

(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.

For the purpose of this title stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (b) of this section, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.

SEC. 203. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

(2) An exemption of $50,000;

(b) In the case of a nonresident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States that proportion of the deductions specified in paragraph (1) of subdivision (a) of this section which the value of such part bears to the value of his entire gross estate, wherever situated. But no deductions shall be allowed in the case of a nonresident unless the executor includes in the return required to be filed under section two hundred and five the value at the time of his death of that part of the gross estate of the nonresident not situated in the United States.

SEC. 204. That the tax shall be due one year after the decedent's death. If the tax is paid before it is due a discount at the rate of five per centum per annum, calculated from the time payment is made to the date when the tax is due, shall be deducted. If the tax is not paid within ninety days after it is due interest at the rate of ten per centum per annum from the time of the decedent's death shall be added as part of the tax, unless because of claims against the estate, necessary litigation, or other unavoidable delay the collector finds that the tax cannot be determined, in which case the interest shall be at the rate of six per centum per annum from the time of the decedent's death until the cause of such delay is removed, and thereafter at the rate of ten per centum per annum. Litigation to defeat the payment of the tax shall not be deemed necessary litigation.

SEC. 205. That the executor, within thirty days after qualifying as such, or after coming into possession of any property of the decedent, whichever event first occurs, shall give written notice thereof to the collector. The executor, shall also, at such times and in such manner as may be required by the regulations made under this title, file with the collector a return under oath in

duplicate, setting forth (a) the value of the gross estate of the decedent at the time of his death, or, in case of a nonresident, of that part of his gross estate situated in the United States; (b) the deductions allowed under section two hundred and three; (c) the value of the net estate of the decedent as defined in section two hundred and three; and (d) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

Return shall be made in all cases of estates subject to the tax or where the gross estate at the death of the decedent exceeds $60,000, and in the case of the estate of every nonresident any part of whose gross estate is situated in the United States. If the executor is unable to make a complete return as to any part of the gross estate of the decedent, he shall include in his return a description of such part and the name of every person holding a legal or beneficial interest therein, and upon notice from the collector such person shall in like manner make a return as to such part of the gross estate. The Commissioner of Internal Revenue shall make all assessments of the tax under the authority of existing administrative special and general provisions of law relating to the assessment and collection of taxes.

SEC. 206. That if no administration is granted upon the estate of a decedent, or if no return is filed as provided in section two hundred and five, or if a return contains a false or incorrect statement of a material fact, the collector or deputy collector shall make a return and the Commissioner of Internal Revenue shall assess the tax thereon.

SEC. 207. That the executor shall pay the tax to the collector or deputy collector. If for any reason the amount of the tax cannot be determined, the payment of a sum of money sufficient, in the opinion of the collector, to discharge the tax shall be deemed payment in full of

the tax, except as in this section otherwise provided. If the amount so paid exceeds the amount of the tax as finally determined, the Commissioner of Internal Revenue shall refund such excess to the executor. If the amount of the tax as finally determined exceeds the amount so paid the commissioner shall notify the executor of the amount of such excess. From the time of such notification to the time of the final payment of such excess part of the tax, interest shall be added thereto at the rate of ten per centum per annum, and the amount of such excess shall be a lien upon the entire gross estate, except such part thereof as may have been sold to a bona fide purchaser for a fair consideration in money or money's worth.

The collector shall grant to the person paying the tax duplicate receipts, either of which shall be sufficient evidence of such payment, and shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts.

SEC. 208. That if the tax herein imposed is not paid within sixty days after it is due, the collector shall, unless there is reasonable cause for further delay, commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or

by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

SEC. 209. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

If the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) and if the tax in respect thereto is not paid when due, the transferee or trustee shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

SEC. 210. That whoever knowingly makes any false statement in any notice or return required to be filed by this title shall be liable to a penalty of not exceeding

$5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Whoever fails to comply with any duty imposed upon him by section two hundred and five, or, having in his possession or contol any record, file, or paper, containing or supposed to contain any information concerning the estate of the decedent, fails to exhibit the same upon request to the Commissioner of Internal Revenue or any collector or law officer of the United States, or his duly authorized deputy or agent, who desires to examine the same in the performance of his duties under this title, shall be liable to a penalty of not exceeding $500, to be recovered, with costs of suit, in a civil action in the name of the United States.

Sec. 211. That all administrative, special, and general provisions of law, including the laws in relation to the assessment and collection of taxes, not heretofore specifically repealed are hereby made to apply to this title so far as applicable and not inconsistent with its provisions.

Sec. 212. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make such regulations, and prescribe and require the use of such books and forms, as he may deem necessary to carry out the provisions of this title.

"ESTATE TAX" PROVISIONS OF THE ACT OF MARCH 3, 1917.

(39 Stat. 1000, 1002)

Title III.—Estate Tax.

Sec. 300. That section two hundred and one, Title II, of the Act entitled "An Act to increase the revenue, and for other purposes." approved September eighth,

nineteen hundred and sixteen, be, and the same is hereby, amended to read as follows:

"SEC. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States:

"One and one-half per centum of the amount of such net estate not in excess of $50,000;

"Three per centum of the amount by which such net estate exceeds $50,000 and does not exceed $150,000;

"Four and one-half per centum of the amount by which such net estate exceeds $150,000 and does not exceed $250,000;

"Six per centum of the amount by which such net estate exceeds $250,000 and does not exceed $450,000;

"Seven and one-half per centum of the amount by which such net estate exceeds $450,000 and does not exceed $1,000,000;

"Nine per centum of the amount by which such net estate exceeds $1,000,000 and does not exceed $2,000,000;

"Ten and one-half per centum of the amount by which such net estate exceeds $2,000,000 and does not exceed $3,000,000;

"Twelve per centum of the amount by which such net estate exceeds $3,000,000 and does not exceed $4,000,000;

"Thirteen and one-half per centum of the amount by which such net estate exceeds $4,000,000 and does not exceed $5,000,000; and

"Fifteen per centum of the amount by which such net estate exceeds $5,000,000."

SEC. 301. That the tax on the transfer of the net estate of decedents dying between September eighth, nineteen hundred and sixteen, and the passage of this Act shall be computed at the rates originally prescribed in the Act approved September eighth, nineteen hundred and sixteen.

"WAR ESTATE TAX," PROVISIONS OF THE ACT OF OCTOBER 3, 1917.

(40 Stat. 300, 324)

TITLE IX.—WAR ESTATE TAX.

SEC. 900. That in addition to the tax imposed by section two hundred and one of the Act entitled "An Act to increase the revenue, and for other purposes," approved September eighth, nineteen hundred and sixteen, as amended—

(a) A tax equal to the following percentages of its value is hereby imposed upon the transfer of each net estate of every decedent dying after the passage of this Act, the transfer of which is taxable under such section (the value of such net estate to be determined as provided in Title II of such Act of September eighth, nineteen hundred and sixteen):

One-half of one per centum of the amount of such net estate not in excess of $50,000;

One per centum of the amount by which such net estate exceeds $50,000 and does not exceed $150,000;

One and one-half per centum of the amount by which such net estate exceeds $150,000 and does not exceed $250,000;

Two per centum of the amount by which such net estate exceeds $250,000 and does not exceed $450,000;

Two and one-half per centum of the amount by which such net estate exceeds $450,000 and does not exceed $1,000,000;

Three per centum of the amount by which such net estate exceeds $1,000,000 and does not exceed $2,000,000;

Three and one-half per centum of the amount by which such net estate exceeds $2,000,000 and does not exceed $3,000,000;

Four per centum of the amount by which such net estate exceeds $3,000,000 and does not exceed $4,000,000;

Four and one-half per centum of the amount by which such net estate exceeds $4,000,000 and does not exceed $5,000,000;

Five per centum of the amount by which such net estate exceeds $5,000,000 and does not exceed $8,000,000;

Seven per centum of the amount by which such net estate exceeds $8,000,000 and does not exceed $10,000,000; and

Ten per centum of the amount by which such net estate exceeds $10,000,000.

Sec. 901. That the tax imposed by this title shall not apply to the transfer of the net estate of any decedent dying while serving in the military or naval forces of the United States, during the continuance of the war in which the United States is now engaged, or if death results from injuries received or disease contracted in such service, within one year after the termination of such war. For the purposes of this section the termination of the war shall be evidenced by the proclamation of the President.

"ESTATE TAX," PROVISIONS OF THE ACT OF FEBRUARY 24, 1919.

(*40 Stat. 1057, 1096*)

TITLE IV.—ESTATE TAX.

SEC. 400. That when used in this title—

The term "executor" means the executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession of any property of the decedent; and

The term "collector" means the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death, or, if there was no such domicile in the United States, then the collector of the district in which is situated the part of the gross estate of the decedent in the United States, or, if such part of the gross estate is situated in more than one district, then the collector of internal revenue of such district as may be designated by the Commissioner.

SEC. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

1 per centum of the amount of the net estate not in excess of $50,000;

2 per centum of the amount by which the net estate exceeds $50,000 and does not exceed $150,000;

3 per centum of the amount by which the net estate exceeds $150,000 and does not exceed $250,000;

4 per centum of the amount by which the net estate exceeds $250,000 and does not exceed $450,000;

6 per centum of the amount by which the net estate exceeds $450,000 and does not exceed $750,000;

8 per centum of the amount by which the net estate exceeds $750,000 and does not exceed $1,000,000;

10 per centum of the amount by which the net estate exceeds $1,000,000 and does not exceed $1,500,000;

12 per centum of the amount by which the net estate exceeds $1,500,000 and does not exceed $2,000,000;

14 per centum of the amount by which the net estate exceeds $2,000,000 and does not exceed $3,000,000;

16 per centum of the amount by which the net estate exceeds $3,000,000 and does not exceed $4,000,000;

18 per centum of the amount by which the net estate exceeds $4,000,000 and does not exceed $5,000,000;

20 per centum of the amount by which the net estate exceeds $5,000,000 and does not exceed $8,000,000;

22 per centum of the amount by which the net estate exceeds $8,000,000 and does not exceed $10,000,000; and

25 per centum of the amount by which the net estate exceeds $10,000,000.

The taxes imposed by this title or by Title II of the Revenue Act of 1916 (as amended by the Act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the extensions of fortifications, and for other purposes," approved March 3, 1917) or by Title IX of the Revenue Act of 1917, shall not apply to the transfer of the net estate of any decedent who has died or may die while serving in the military or naval forces of the United States in the present war or from injuries received or disease contracted while in such service, and any such tax collected upon such transfer shall be refunded to the executor.

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent;

(e) To the extent of any property passing under a general power of appointment exercised by the dece-

dent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

SEC. 403. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise, and such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy, or inheritance taxes;

(2) An amount equal to the value at the time of the decedent's death of any property, real, personal, or mixed, which can be identified as having been received by the decedent as a share in the estate of any person who died within five years prior to the death of the decedent, or which can be identified as having been acquired by the decedent in exchange for property so

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received, if an estate tax under the Revenue Act of 1917 or under this Act was collected from such estate, and if such property is included in the decedent's gross estate;

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; and

(4) An exemption of $50,000;

(b) In the case of a nonresident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States—

(1) That proportion of the deductions specified in paragraph (1) of subdivision (a) of this section which the value of such part bears to the value of his entire gross estate, wherever situated, but in no case shall the amount so deducted exceed 10 per centum of the value of that part of his gross estate which at the time of his death is situated in the United States;

(2) An amount equal to the value at the time of the decedent's death of any property, real, personal, or mixed, which can be identified as having been received by the decedent as a share in the estate of any person who died within five years prior to the death of the decedent, or which can be identified as having been acquired by the decedent in exchange for property so received, if an

estate tax under the Revenue Act of 1917 or under this Act was collected from such estate, and if such property is included in that part of the decedent's gross estate which at the time of his death is situated in the United States; and

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any domestic corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes within the United States. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; and

No deduction shall be allowed in the case of a nonresident unless the executor includes in the return required to be filed under Section 404 the value at the time of his death of that part of the gross estate of the nonresident not situated in the United States.

For the purpose of this title stock in a domestic corporation owned and held by a nonresident decedent, and the amount receivable as insurance upon the life of a nonresident decedent where the insurer is a domestic corporation, shall be deemed property within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (c) of Section 402, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.

In the case of any estate in respect to which the tax

under existing law has been paid, if necessary to allow the benefit of the deduction under paragraph (3) of subdivision (a) or (b) the tax shall be redetermined and any excess of tax paid shall be refunded to the executor.

SEC. 404. That the executor, within sixty days after qualifying as such, or after coming into possession of any property of the decedent, whichever event first occurs, shall give written notice thereof to the collector. The executor shall also, at such times and in such manner as may be required by regulations made pursuant to law, file with the collector a return under oath in duplicate, setting forth (a) the value of the gross estate of the decedent at the time of his death, or, in case of a nonresident, of that part of his gross estate situated in the United States; (b) the deductions allowed under Section 403; (c) the value of the net estate of the decedent as defined in Section 403; and (d) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

Return shall be made in all cases where the gross estate at the death of the decedent exceeds $50,000, and in the case of the estate of every nonresident any part of whose gross estate is situated in the United States. If the executor is unable to make a complete return as to any part of the gross estate of the decedent, he shall include in his return a description of such part and the name of every person holding a legal or beneficial interest therein, and upon notice from the collector such person shall in like manner make a return as to such part of the gross estate. The Commissioner shall make all assessments of the tax under the authority of existing administrative special and general provisions of law relating to the assessment and collection of taxes.

SEC. 405. That if no administration is granted upon the estate of a decedent, or if no return is filed as pro-

vided in Section 404, or if a return contains a false or incorrect statement of a material fact, the collector or deputy collector shall make a return and the Commissioner shall assess the tax thereon.

SEC. 406. That the tax shall be due one year after the decedent's death; but in any case where the Commissioner finds that payment of the tax within one year after the decedent's death would impose undue hardship upon the estate, he may grant an extension of time for the payment of the tax for a period not to exceed three years from the due date. If the tax is not paid within one year and 180 days after the decedent's death, interest at the rate of 6 per centum per annum from the expiration of one year after the decedent's death shall be added as part of the tax.

SEC. 407. That the executor shall pay the tax to the collector or deputy collector. If the amount of the tax can not be determined, the payment of a sum of money sufficient, in the opinion of the collector, to discharge the tax shall be deemed payment in full of the tax, except as in this section otherwise provided. If the amount so paid exceeds the amount of the tax as finally determined, the Commissioner shall refund such excess to the executor. If the amount of the tax as finally determined exceeds the amount so paid, the collector shall notify the executor of the amount of such excess and demand payment thereof. If such excess part of the tax is not paid within thirty days after such notification, interest shall be added thereto at the rate of 10 per centum per annum from the expiration of such thirty days' period until paid, and the amount of such excess shall be a lien upon the entire gross estate, except such part thereof as may have been sold to a bona fide purchaser for a fair consideration in money or money's worth.

The collector shall grant to the person paying the tax duplicate receipts, either of which shall be sufficient

evidence of such payment, and shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts.

SEC. 408. That if the tax herein imposed is not paid within 180 days after it is due, the collector shall, unless there is reasonable cause for further delay, proceed to collect the tax under the provisions of general law, or commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto.

If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution. If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor

shall be entitled to recover from such beneficaries in the same ratio.

SEC. 409. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate releasing any or all property of such estate from the lien herein imposed.

If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

SEC. 410. That whoever knowingly makes any false statement in any notice or return required to be filed

under this title shall be liable to a penalty of not exceeding $5,000, or imprisonment not exceeding one year, or both.

Whoever fails to comply with any duty imposed upon him by Section 404, or, having in his possession or control any record, file, or paper, containing or supposed to contain any information concerning the estate of the decedent, or, having in his possession or control any property comprised in the gross estate of the decedent, fails to exhibit the same upon request to the Commissioner or any collector or law officer of the United States, or his duly authorized deputy or agent, who desires to examine the same in the performance of his duties under this title, shall be liable to a penalty of not exceeding $500, to be recovered, with costs of suit, in a civil action in the name of the United States.

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No. 286

IN THE

Supreme Court of the United States

October Term, 1920

New York Trust Company and Albert W. Pross, as Executors of the Last Will and Testament of J. Harsen Purdy, Deceased, Plaintiffs in Error,

vs.

Mark Eisner.

REPLY BRIEF FOR PLAINTIFFS IN ERROR

FRANCIS J. McLOUGHLIN,
Attorney for Plaintiffs in Error.

GEORGE SUTHERLAND,
H. T. NEWCOMB,
Of Counsel.

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REPLY BRIEF FOR PLAINTIFF IN ERROR

I.

The Tax as an Intrusion Upon State Power

The Solicitor General contends that the estate tax law of 1916 does not differ in principle from the law involved in the case of *Knowlton* v. *Moore.* It is insisted that the principle established by that case and applicable here is that:

> "The power of the state to regulate the transmission of property does not exclude the power of Congress to tax that transmission *when regulated.*" (P. 21.)

To this it may be replied that the power of the state to accomplish and condition the transmission of property from the dead to the living, is not exhausted by the mere passage of a law prescribing the rules. The *administration* of the law by the state is as much an exercise of its sovereign power as the enactment of the law. Whether such administration, speaking with strict accuracy, should be called the exercise of the power to regulate or the exercise of the power to carry the regulations into effect, the result is the same. The federal government is as much precluded from interfering with the one as with the other.

> "It may be admitted that the reserved rights of the states such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress." *Veazie Bank* v. *Fenno,* 8 Wall. 533, 547.

The government construes our contention respecting the decisions of this court to be, in effect, that a federal death statute is valid if the burden be cast upon the recipient, but invalid if it be cast upon the person transmitting an estate, or upon his personal representatives. This is not an accurate statement of our position. What we contend is that the *entire* burden of the tax discussed in *Knowlton* v. *Moore* was cast upon the recipient, and that no burden whatsoever was cast upon the power of the state. This follows from the fact that before the incidence of the tax, the power of the state exerted in making the

regulations as well as in carrying them into effect by its own processes, was exhausted, and that as a result of these regulations and these processes there had emerged a subject which it was within the competency of the federal government to tax. The provision for payment by the executor is a matter of mere convenience, not differing in principle from any other provision for payment of a tax by the custodian of a fund before passing it on. The burden falls on the recipient. The state is no longer concerned and cannot be affected.

To say that the federal government may impose a tax, the burden of which is cast upon the *result* of the state processes, is very different from saying that the federal government may impose a tax which burdens or interferes with, or intrudes upon, the processes themselves. In other words, the difference between a tax falling upon the recipient of the legacy and this tax imposed upon the estates of decedents is not that the former is a burden upon the recipient and the latter is a burden upon the property or upon the personal representatives, but that the former is cast *only* upon the recipient while the latter is cast in such a way and at such a juncture that it also constitutes an intrusion upon the powers and processes of the state. This distinction is well illustrated by the decisions of this court involving the validity of state taxation. For example, the fact that a tax on the occupation of an importer was paid by the importer or that a tax on interstate business was paid by the corporation engaged in such business and therefore that the financial burden fell upon them did not render the

tax any the less one upon the import or one which invaded the federal power to regulate interstate commerce. In this connection we invite the Court's attention to what is said in the brief filed by the Attorney General of Minnesota as *amicus curiæ,* at pages 16-18, 35-45; and also to what is said in the brief filed by counsel for the estate of Chester A. Congdon as *amicus curiæ,* pp. 24-28, 33-49.

A tax which would be perfectly valid if only the government and the tax-payer be considered, may, nevertheless, be invalid because it impinges upon the instrumentalities, the powers or processes of the state. The actual effect in a given instance may be negligible but the validity of the tax is to be tested by considering it as though carried to the point of destruction. The question is not concluded by the determination that the tax, *apart from this interference,* would be valid, or that the interference is of small consequence.

In the instant case the amount of the tax may be such that the ability of no state to exact, for example, a part of the estate as a condition upon which a transmission of the remainder is allowed, has, in fact, been affected; yet, nevertheless, if the tax be increased to 100 per cent. such power of the state would be completely destroyed. This consequence, if the tax be upheld, being possible, the law is invalid. The power to tax being the power to destroy, the principle to be applied, as Mr. Justice Brewer has said, is not "*de minimus non curat lex*" but "*obsta principiis.*"

Fairbank v. *U. S.,* 181 U. S. 283, 291-2.

It is urged by the Solicitor General that a tax imposed

on a conveyance of real estate executed as required by the laws of the state, presents an analogy. A moment's consideration, however, exposes the fallacy of this contention. In the case supposed the state not only has completed the exercise of its strictly regulating power by enacting a law regulating the conveyance, but the state is not directly concerned in carrying the law into operation, as it is concerned in the case of the devolution of estates of decedents. In the case of a transfer of property by deed the state makes its law regulating the forms and ceremonies to be observed, and then leaves it to be carried into operation not by the state but by the private individuals concerned in the transaction. The process of conveying property from one living man to another is not one accomplished by the state, nor one which the state oversees or directs, nor one in which the state administers the property which is the subject of conveyance. The exercise of the state power ends with the making of the law. The tax here involved, however, is cast upon a transfer not only effectuated in conformity to state law, *but while it is being effectuated and consummated by the state itself*. The tax, therefore, is an intrusion upon the active processes of the state, an invasion of its sovereignity and in unmistakable disparagement of its dignity.

It is further contended that the transfer which is sought to be taxed is not that of the universal succession to the executor, but is the transfer by which the beneficiaries finally receive the property (p. 27). This subject has been fully covered by our original brief, but we take occasion to make one additional sugges-

tion in reply. The tax is, in terms, imposed upon the transfer of the "net estate" which is defined by the act. It is to the transfer of *this* net estate, so defined, and not to some other, that the statute relates. What the beneficiaries receive, whether as a unit or in shares, is not this net estate but it is this net estate, or the proceeds of it, less the federal income tax and, according to the government's contention (and under the law itself as amended later), state transfer and inheritance taxes and perhaps other deductions not included within those enumerated by Section 203.

II.

The Argument That It Is Not A Direct Tax

The claim of the government seems to be that the question as to whether a tax imposed with reference to property may be avoided is of no practical concern. Attention is called to the corporation tax law of 1909 which was passed in August but applied to corporations doing business from the beginning of the year. And it is said that the tax there was imposed regardless of anything which the corporation did voluntarily or involuntarily *after the passage of the act* (p. 32). This contention, however, confuses the question of the retrospective operation of the law with the quality of the act which was taxed. Congress has the power to impose a tax upon past transactions as well as upon future transactions. And in either case the character of the tax is to be determined by the quality of the act, and not by reference to the time of its performance.

The act of a corporation in doing business is volun-

tary whether there is a tax law in existence or not. The power of Congress to lay the tax was something which the corporation was bound to know, and its failure to anticipate the particular levy could not possibly have any effect upon the question as to whether it engaged in business voluntarily or involuntarily.

Again, it is said (p. 35) that excise taxes may "equally be imposed upon the happening of an event which will happen only through the voluntary act of the tax-payer, and upon the happening of another event which, in the course of every human life, must occur." It is conceded that in the case of a legacy tax the legatee, by renouncing, may avoid the payment of the tax but that the decedent cannot prevent his estate passing to some one. But it is insisted there is no real difference between the two. "If the legatee refuses to accept," it is said, "either the will or the law of the state determines that some other person is entitled to receive it and that person pays the tax." But this merely shifts the matter to new shoulders. It does not end it. The next person entitled to receive may renounce. And again, the next, and so on until none are left. In the case of the tax here involved, however, there is no possible way by which payment can be avoided except as any other property tax may be avoided by failing to acquire property.

The argument of the government upon the subject of the avoidability of the tax really does away with that distinction altogether. It is said that to avoid this tax all a man has to do is not to accumulate an estate (p. 34). But if the voluntary nature of the exaction in the instant case turns upon so rigid a test

liability for a tax imposed in terms directly upon the estate. If the latter be a direct tax, how can the former be an indirect tax?

The Supreme Court of Missouri in the case of *State ex rel Garth v. Switzler*, 143 Mo. 287 (40 L.R.A. 280) had before it almost the precise question here involved. The statute of Missouri provided that all property conveyed by will, or by the death of an intestate, to collateral heirs, should be subject to the payment of a "collateral succession tax" in an amount named. It was held that this was nevertheless a tax upon the property. Attention was called to the fact that under the law the tax was to be levied upon the appraised value of the whole estate, and was to be paid by the personal representatives of the deceased and not by the devisees and legatees. The Court said:

> "How such a tax differs from general taxes upon the property of the deceased under our system, we are not able to state. The mere calling of such a tax 'a succession tax' does not make it different from an ordinary tax upon property when the effect and operation are identical with an ordinary property tax."

Moreover, the definition of the basis of the exaction ("the net estate" defined by Sections 202 and 203) makes it apply to property which the decedent could not transfer. Paragraphs (b) and (c) of Section 202 bring within the purview of the exaction property transferred *inter vivos* and property which the decedent could not transfer. Paragraph (c), for example, relates to interests held jointly and by the entirety and brings within the taxable estate the whole value

of property affected by such an interest of the decedent. (Internal Revenue Regulations 37, Revised to January, 1921; Articles 27-8, p. 21.) It is the very essence of such interests that there is no transfer at death, that during the entire existence of the joint tenancy there was no power in the decedent to transfer or to transmit.

> " * * * when two or more persons are seized of a joint estate * * * the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; * * *. This is the natural and regular consequence of the unity and entirety of their interest. The interest of two joint tenants is not only equal or similar, but also is one and the same." *Cooley's Blackstone,* Vol. 1, Book II, p. 182.

See also

Cooley's Blackstone, Vol. 1, Book II, p. 179;
4 Kent's Commentaries, p. 360;
Dembitz on Land Titles, Vol. 1, pp. 195-6.

Paragraphs (b) and (c) of Section 202 seem clearly to show that Congress had no intention to confine the exaction here contested to property to which the words "transfer of" could have application.

Respectfully submitted,

FRANCIS J. McLOUGHLIN,
Attorney for Plaintiffs in Error.

George Sutherland,
H. T. Newcomb,
Of Counsel.

No. [illegible]

In the Supreme Court of the United States

October Term, 1940

New York Trust Company, as Trustee [illegible]
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AUTHORITIES CITED.

STATUTES.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

NEW YORK TRUST COMPANY AND ALBERT W. PROSS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF J. HARSEN PURDY, DECEASED, PLAINTIFFS IN ERROR, *v.* MARK EISNER.	No. 286.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

By the writ of error in this case it is sought to review the judgment of the District Court dismissing on demurrer a suit commenced by the plaintiffs in error, as executors of J. Harsen Purdy, to recover $23,910.70, paid under protest, as an estate tax.

STATUTE INVOLVED.

The taxes were imposed under sections 200 et seq. of the Revenue Act of 1916 (39 Stat., chap. 463, pp. 756, 777). These sections appear in the Act as Title II.—Estate Tax. The pertinent parts of them are as follows:

> That a tax (hereinafter in this title referred to as the tax), equal to the following per-

centages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

One per centum of the amount of such net estate not in excess of $50,000;

Two per centum of the amount by which such net estate exceeds $50,000 and does not exceed $150,000;

* * * * *

Five per centum of the amount by which such net estate exceeds $450,000 and does not exceed $1,000,000;

* * * * *

Ten per centum of the amount by which such net estate exceeds $5,000,000.

Section 202 enumerates the things which shall be included in ascertaining the value of the gross estate.

Section 203 is as follows:

That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges

against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

(2) An exemption of $50,000;

*   *   *   *   *

Subsequent sections fix the time within which the tax shall become due and payable, prescribe the reports to be made by the executor or administrator, require the executor or administrator to pay the tax and declare a lien for the same upon the gross estate of the decedent, except that such parts thereof as are used for the expenses of the estate and its administration shall be divested of the lien. Authority to commence appropriate proceedings and to subject the property of the decedent to the payment of the tax is given.

Section 208 contains the following provision:

> If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practi-

cable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

THE FACTS.

The facts, as alleged in the complaint, are that J. Harsen Purdy died on December 18, 1916, leaving a will in which the plaintiffs in error were named as executors. After disposing of a part of the estate by specific legacies and devises, he devised and bequeathed the residue of his estate to his executors, as trustees, upon certain trusts for the benefit of certain relatives.

The eleventh clause of the will was as follows:

> I direct that all succession, inheritance, and transfer taxes upon the property devised and bequeathed by the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth clauses of my will shall be paid out of the residuary estate devised and bequeathed by the Twelfth clause of my will. (Rec., p. 3.)

Having added a codicil, he included therein the following:

> I direct that all succession, inheritance, and transfer taxes upon the property bequeathed by the codicil shall be paid out of the residuary estate devised and bequeathed by the Twelfth clause of my said will. (Rec., p. 3.)

The value of the gross estate was $769,799.39, and the amount of all funeral expenses, debts, and expenses of administration was $61,322.08, leaving a balance of $708,477.31. Treating this as the net

estate, the commissioner of internal revenue required the executors to pay taxes to the amount of $23,910.77.

The executors were required to pay inheritance and succession taxes in the States of New York, Colorado, Wisconsin, Kansas, Michigan, and New Jersey to the amount of $37,769.88. They claimed the right to deduct this amount from the above balance of $708,477.31 and to treat the remainder, or $670,707.43, as the net estate. This claim was disallowed and, after taking the steps necessary to entitle them to sue, the executors commenced this action against the collector to whom payment was made.

CONTENTIONS OF PLAINTIFFS IN ERROR.

1. They sued for the full amount of taxes paid, upon the ground that the Act imposing the tax was unconstitutional for the following reasons:

> (*a*) It attempts to levy a tax upon the operation of the laws of the several States and to diminish and impair the exercise by the several States of their exclusive constitutional right to control and regulate the administration of the estates of decedents.
>
> (*b*) It attempts to create a tax which, if valid, would tax the right or privilege of one individual at a rate fixed with reference to the value of the right or rights or privilege or privileges of another individual or of other individuals, thus bringing about a profound inequality which transcends the limitations arising from the fundamental conceptions of

free government which underlie all Constitutional systems.

(*c*) It is not a valid exercise of any power to lay taxes, imposts, or excises conferred upon the Congress of the United States, because it does not lay equal burdens upon or in respect of persons or property similarly situated, but makes arbitrary, accidental, and unreasonable discriminations and classifications, and, as to these plaintiffs, would, if valid, exact and has exacted more from them than from others taking legacies and distributive shares of like character and equal value under substantially identical circumstances and conditions.

(*d*) It attempts to create a direct tax which, if valid, would be a direct tax not apportioned among the several States, in proportion to population.

(*e*) It attempts to create a tax which, if valid, would not be uniform throughout the United States.

(*f*) It would, if effective, take property without due process of law.

2. If it shall be held that the Act is constitutional, they sued for $1,888.49, the taxes on an amount equal to the sum of $37,769.88, which was paid by them to the various States as inheritance and succession taxes.

BRIEF.

Two general questions are presented by the record. First, is the Act imposing the tax in question constitutional, and, second, if so, must the sums paid to various States as inheritance and succession taxes be

deducted from the gross estate in order to ascertain the amount on which the tax is to be computed.

I.

The only governmental power involved is the power of taxation.

In the brief for plaintiffs in error there is a discussion of seven ways in which a Government may acquire the private property of an individual. We may at once put all of these aside save one. The statute is a taxing Act and nothing else. The only governmental power to which it can be referred is the power of taxation, and that power alone need now be considered.

II.

The tax in question is a death duty and rests upon the power to transmit or the transmission from the dead to the living.

The tax in question is, in plain terms, "imposed upon the transfer of the net estate of every decedent dying after the passage of this Act." The question, therefore, is whether the Congress of the United States has the power to impose a tax of this kind upon the transmission, or the power to transmit property, from the dead to the living.

The opinion in *Knowlton* v. *Moore*, 178 U. S. 41, leaves but little to be said as to the general nature of such taxes. In that case, after a most exhaustive review of the laws both of this country and of other countries, the present Chief Justice said (pp. 55–56):

> Thus, looking over the whole field, and considering death duties in the order in which we

have reviewed them, that is, in the Roman and ancient law, in that of modern France, Germany, ana other continental countries, in England and those of her colonies where such laws have been enacted, in the legislation of the United States and the several States of the Union, the following appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes or privilege taxes, nevertheless, tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested.

In other words, all the various taxes thus enumerated by the court belong to the general class of taxes known as death duties. They differ as to the mode in which they are assessed. Sometimes, as in the case of probate duties or estate taxes, they are required to be paid out of the estate before distribution. In others, as in the case of legacy taxes, they are paid out of the particular legacy. Thus, in some cases, the person who transmits the property, or his personal representative, is required to pay the tax. In others, the person to whom the property is transmitted must pay. In one case the tax falls on the interest in property which ceases with death;

in the other, it falls on the property which is received by the living. In one case it is a tax on the power or right to transmit; in the other, on the power or right to receive. But, whether it be assessed in the one way or the other, it has the attributes of and belongs to the class of taxes known as death duties, which rest immediately upon the power to transmit. In this case, therefore, it is clear that, since the tax is imposed upon the transfer of the estates of decedents, it rests immediately upon the power to transmit or upon the transmission from the dead to the living. It is a death duty and possesses, in general, the attributes belonging to such duties.

III.

Death duties, in general, when levied by the Federal Government, are not subject to constitutional objection upon the ground that they are direct taxes and can not be imposed without apportionment.

Except as expressly limited by the Constitution itself, the taxing power of Congress extends to all usual objects of taxation (License Tax Cases, 5 Wall., 462, 471) and—

> All courts and all governments, however, as we have already shown, conceive that the transmission of property occasioned by death, although differing from the tax on property as such, is, nevertheless, a usual subject of taxation. (*Knowlton* v. *Moore*, supra, p. 58.)

Except, therefore, as controlled by constitutional limitations, the power of Congress to impose a tax upon the transmission of property occasioned by

death is unquestionable. The only express constitutional limitation which it is claimed applies is that *direct taxes* shall not be imposed except by apportionment among the States. In *Knowlton* v. *Moore*, *supra*, it was insisted that this limitation applied to all death duties, and that hence an Act imposing taxes of any kind upon the transmission of property occasioned by death could be imposed only by apportionment. The contention, however, was rejected. The court said:

> Taxes of this general character are universally deemed to relate, not to property *eo nomine*, but to its passage by will or by descent in cases of intestacy, as distinguished from taxes imposed on property, real or personal, as such, because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a tax on property disassociated from its transmission or receipt by will or as the result of intestacy. (Id., p. 47.)

Indeed, it is conceded that unless the tax now in question is distinguishable in principle from that considered in *Knowlton* v. *Moore* the decision in that case conclusively establishes that it is not a direct tax within the meaning of the Constitution. The argument by which it is sought to distinguish the two cases will be noticed later.

IV.

Death duties, in general, when levied by the Federal Government, are not subject to constitutional objection upon the ground that the transmission of property from the dead to the living is subject to exclusive regulation by the States.

It is insisted in this case, as it was in *Knowlton* v. *Moore*, that the tax is invalid because the regulation of the transmission of property by death is in the exclusive power of the States, and that hence the imposition of the tax is beyond the power of Congress, because an interference by the National Government with a matter which falls alone within the reach of State legislation. In *Knowlton* v. *Moore*, after stating this contention, Mr Justice White said:

> It is to be remarked that this proposition denies to Congress the right to tax a subject matter which was conceded to be within the scope of its power very early in the history of the government. (Page 56.)

And, after showing that, according to the construction of the Constitution during the early history of the country, death duties were deemed to be within the power of Congress, it was said (page 59):

> But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the

transmission or receipt, and not the right existing to regulate. In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the Government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the Government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the States to tax objects which are confessedly within the reach of their taxing power, and also excludes the National Government from almost every subject of direct and many acknowledged objects of indirect taxation. Thus imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the State cannot be taxed, because it had been at some prior time the subject of exclusive regulation by Congress? Again, interstate commerce is often within the exclusive regulating power of Congress. Can it be asserted that the property of all persons or corporations engaged in such commerce is not the subject of taxation by the several States, because Congress may regulate interstate commerce? Conveyances, mortgages, leases, pledges, and, indeed, all property and the contracts which arise from its ownership, are subject more or less to State regulation, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto can not be taxed by Congress, even in the form of

> a stamp duty. It cannot be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and State Governments are divested of those powers of taxation which from the foundation of the Government admittedly have belonged to them. Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient and not upon the power of the State to regulate.

There is no contention that the Federal Government has any power to regulate the transmission of property from the dead to the living. It is admitted that this is within the exclusive power of the States. It is equally true, however, that the regulation of conveyances of property as between the living is in the same way within the exclusive power of the States. The States may prohibit conveyances to aliens or others whom its public policy forbids to own real estate. They do provide the manner in which deeds shall be excuted in order to pass title to real estate. With these regulations the Federal Government has no power to interfere. But no one would deny the power of Congress to impose a tax on the conveyance of real estate by requiring a stamp to be attached to a deed executed as required by the laws of the State. Such a tax is not a tax upon the power of the State or upon the exercise of its governmental functions. It is a tax upon the transmission or con-

veyance of property, and is imposed either upon the seller or the buyer as Congress may determine. In the same way, a tax upon the transmission of property from the dead to the living is not a tax upon the power of the State to regulate the administration and distribution of estates. It is a tax upon the transmission of property and is imposed on the decedent or his representative or upon the recipient of the property according as Congress deems it wise to impose an estate tax or a legacy tax.

V.

The precise question involved.

The argument of counsel for plaintiffs in error has taken a very wide range. In view of the admissions made, however, as to the extent to which the law on this subject has been finally established, the precise question involved lies within a very narrow compass.

The constitutionality of the tax in this case is assailed upon two main grounds: (1) It is insisted that the tax is void because its imposition amounts to a regulation of the descent and distribution of estates, which is exclusively within the power of the States. (2) It is insisted that the tax is a direct tax, and therefore could not be imposed by Congress without apportionment among the States.

These are the same grounds upon which the tax involved in *Knowlton* v. *Moore*, 178 U. S. 41, was unsuccessfully assailed. Counsel raise no question as to the correctness of the decision in *Knowlton* v.

Moore as applied to a tax such as that then in question. Their sole contention is that the present tax is of such a different character from the former tax that a different rule must apply. They have expressly narrowed the contention to the question as to whether the one tax, as regards the constitutional objections, is, in principle, distinguishable from the other. Thus, at page 14 of their brief, they say:

> The objection here made to the act of September 8, 1916, does not rest upon denial of the authority of Congress to provide for obtaining revenue by resort to death duties. That power, i. e., the power to reach this subject-matter by Federal taxation, is finally established. But it will be argued herein that the attempt to impose death duties evidenced by the Act of September 8, 1916 (section 200, et seq.), is constitutionally defective on account of the intrinsic character and inevitable results of this particular effort towards the exertion of legislative power.

And at page 61 they say:

> Now there is no suggestion in this brief, and after the decisions in *Scholey* v. *Rew*, *supra*, such a suggestion might well invoke ridicule, that Congress is without power to tax the transmission of legacies and distributive shares *when out of the administrative process prescribed by the State there has finally emerged an ascertained or ascertainable right to receive property or some valuable interest therein by testate or intestate succession.*

The taxes assailed in *Scholey* v. *Rew*, 23 Wall. 331, and *Knowlton* v. *Moore*, 178 U. S. 41, were legacy taxes. They were held to be taxes *upon the transmission of property* from the dead to the living, and particularly upon the right to receive the property so transmitted. Being taxes thus imposed upon the right to receive and assessed against the recipient, they were measured in each case by the value of the legacy or property so received. It is now conceded, therefore, that a tax imposed upon the transfer or transmission of property from the living to the dead, when assessed against the recipient and measured by the value of the property received, is not subject to either of the constitutional objections above mentioned. If, therefore, there is in this regard no essential difference between such a tax and the tax imposed by the Act of 1916, it is conceded that *Knowlton* v. *Moore* is controlling and the tax is valid. The question then is, wherein do the two Acts differ?

It is conceded that both are taxes upon the transmission or transfer of property from the dead to the living and that both come within the general definition of death duties. It is insisted, however, that it is not within the power of Congress to impose some forms of death duties. And it is said that the present tax differs from the one above described in that, while it is imposed on the transmission of property from the dead to the living, it is not assessed against the recipient of the property, but rather against the decedent or his personal representative—is measured not by the value of a particular legacy

but by the value of the entire estate to be transmitted. If the two taxes be distinguishable, the distinction must be found in these points of difference. The precise controversy, therefore, may be thus stated:

(1) Conceding that a tax imposed upon the transfer or transmission from the dead to the living is not void because an interference with the right of the State to regulate the descent and distribution of estates *when assessed against the recipient and measured by the amount to be received*, is such a tax invalid because an unconstitutional interference with a matter subject to the exclusive control of the State *when the tax is assessed against the decedent or his personal representative and measured by the value of the estate to be transmitted?*

(2) Conceding that such a tax is not a direct tax *when assessed against the recipient of the property transmitted*, does it become a direct tax *when assessed against the decedent or his estate?*

The answers to these two questions will determine whether the constitutional objections above mentioned are sound.

VI.

The imposition of an estate tax by the Federal Government is no more an interference with the power of the States to regulate the descent and distribution of estates than is the imposition of a legacy tax.

In *Knowlton* v. *Moore*, *supra*, it was said that, before the court could intelligently pass upon the constitutional questions made, it was necessary to first

determine the objects or rights upon which, by the law, the taxes were imposed and assessed. There was then an exhaustive discussion of the history and the general subject of death duties, with the result that the conclusion was reached, as quoted above, that such duties, whether in the form of stamp taxes, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes, or privilege taxes, "rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested." (Id., p. 56.) In other words, in whatever form a death duty is imposed, the power to impose it arises upon the happening of an event, a death, and the power so brought into being is the power to impose a tax on the transmission of property from the dead to the living. This is true whether the tax be in the form of an estate tax or a legacy tax. Indeed, this conclusion is not now contested. The claim is simply that some death duties are within and some without the power of Congress to impose. In *Knowlton* v. *Moore, supra*, the tax in question was held to be a legacy tax. The claim now is that, since the present tax is an estate tax, the decision in that case is not controlling. The contention is that, while Congress may tax the right to *receive* property transmitted by death without interfering with the powers of the State, any effort to tax the right to *transmit* will result in such an inter-

ference. It may be well, therefore, to examine the grounds upon which this constitutional objection was rejected when urged against a legacy tax in *Knowlton* v. *Moore*, and to point out that the decision in that case is based upon principles which leave no room for such a distinction.

It has already been shown that the court pointed out the necessity of determining the subject or object of the tax as levied by Congress before dealing with the constitutional question. When it came to deal with this particular question, it again emphasized that fact by saying, at page 57:

> Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties.

And, rejecting the contention that, in order for the Federal Government to impose a tax of this kind, there must be some privilege derived from that government, it was said:

> The qualification of such taxes as privilege taxes, or describing them as levied on a privilege, may also produce misconception, unless the import of these words be accurately understood. (Id., p. 57.)

It was then said that these words have been used where the power of a State government to levy a particular form of inheritance or legacy tax has been assailed because of some limitation contained in the

State constitution. It was then pointed out that, in such cases, a State might require an exaction of this kind in return for a privilege granted by it, although, if the exaction rested alone upon its taxing power, it might come in conflict with some constitutional limitation. And the court said (page 57):

> The conception, then, as to the privilege, whilst conceding fully that the occasion of the transmission or receipt of property by death is a usual subject of the taxing power, yet maintains that a wider discretion or privilege is vested in the States, because of the right to regulate. Courts which maintain this view have therefore treated death duties as disenthralled from limitations which would otherwise apply, if the privilege of regulation did not exist.

In other words, the transmission of property from the dead to the living is one of the usual objects of taxation. The question as to whether such transmission is a privilege granted by the Government imposing the tax is of no importance, unless the tax or exaction is imposed in a form not permitted, in the case of an ordinary tax, by the Constitution of that Government. In the latter case, the fact that the Government has granted such a privilege may justify a tax which would otherwise be obnoxious to the Constitution.

It is conceded, of course, that, in the descent and distribution of estates, no rights or privileges are derived from the Federal Government; but, as expressly decided in *Knowlton* v. *Moore*, this is by no

means an essential to the validity of the tax. This was made plain at page 59, where it was said:

> But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate.

It will be observed that, throughout, the court draws no distinction between the right to transmit and the right to receive. The subject of the tax is each time said to be, in effect, either *the transmission* or *the receipt* of property occasioned by death. The argument that was rejected was that—

> wherever a right is subject to exclusive regulation, by either the Government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the Government having the mission to regulate. (Id., p. 59.)

It was rejected upon the express ground that in the case then before the court the tax was a "burden cast upon the recipient and not upon the power of the State to regulate." In other words, the power of the State to regulate the transmission of property does not exclude the power of Congress to tax that transmission when regulated. It is true that this decision was in a case where the burden was cast upon

the recipient. It is said, therefore, that the court has not decided that the same rule applies where the burden is cast upon the person transmitting or his personal representative. Since, however, the tax at last is upon the transmission, if casting a burden upon the recipient prevents it being a tax or burden upon the power of the State to regulate, it is difficult to see how a different rule can apply when a tax is laid on the same subject but the burden cast on the person who transmits. The State has the right to determine who shall inherit or who may receive by bequest or devise. The Federal Government can not interfere to control it in that matter. But, in the same way, the State has the right to control the power of any person to transmit his property upon his death. The rights of the decedent are in the same sense, and just as completely as the rights of the recipient, subject to the control of the State. The right which one has in case of intestacy to have his property distributed is governed by the laws of the State. The right which one has to receive property left by a decedent is, in cases of intestacy, a right provided by regulations adopted by the State, and, in case of a will, a right to receive according to directions of the testator, which directions are themselves subject to the same control by the State. The right to transmit exists subject to State control. The right to receive is subject to the same control. A tax assessed against either him who transmits or him who receives is, at last, a tax upon the same thing—the transfer or transmission of the property.

It is said that the property is not received until the process of administration has been completed. It may, however, with equal, or more, truth, be said that the process of administration is never completed until the property has reached the hands of the recipient. It is just as much an administrational function to distribute the estate and place it in the hands of the recipients as it is to collect it and prepare it for distribution. Until it has left the hands of the personal representative and reached its final destination there has been no completed administration.

In the case of legacy taxes, the Government says to the owners of property, you may, without the payment of a tax, exercise your right to transmit your property as you may direct by will or to have it transmitted and distributed according to the laws of the State, but at the same time says to each of the heirs and distributees or legatees and devisees, you shall pay a tax on the right to receive property which the decedent has been permitted to transmit without the payment of a tax. In the case of estate taxes the Government pursues a different course. It says to the owner of property, you have the right, upon your death, to have your property transmitted and distributed as you may direct by will or as may be provided by State law, and, as against this right, there shall be assessed a tax which your personal representative must pay and which shall accrue immediately upon your death; and this tax having been paid, the right of those to whom your property is transmitted to receive it may be exercised without

the payment of a tax. If, as conceded, the one is not obnoxious because interfering with the State's right to regulate descent and distribution, it is impossible to say that the other is.

The transaction of transmitting property necessarily includes two acts: One person must transmit and another must receive before it can be said that there has been a transmission. Both of these acts are equally subject to control by the various States. The power to tax the transaction, as held in *Knowlton* v. *Moore*, arises upon the happening of an event—the death of the owner of property. The interest upon which the burden of the tax falls is either the interest which ceases upon the happening of that event or the interest which arises from it. This must be true because, while the transaction itself is the occasion which gives rise to the tax, it is not anything substantial out of which the tax can be paid. If, therefore, a tax is to be imposed as a result of the transaction, its burden must fall on one or the other, or both, of the interests mentioned. If the power to impose the tax exists, the power to determine upon which of these interests the burden shall fall is necessarily implied. The case is strictly analogous to that of a transfer of property by deed. In such cases, the conveyance is subject to regulation by the laws of the State. One person has the right to convey and the other to receive in the manner provided and regulated by State laws. That this right, so regulated, may be taxed by the Federal Government can not be questioned. This is true for the same reason that the transmission of

property from the dead to the living was held to be taxable in *Knowlton* v. *Moore*—that is, the tax is on this regulated right and not upon the power of the State to regulate. The Government having the right to tax the transfer of property by deed, it is safe to say that the right to determine whether it will impose the tax on the seller or the buyer would not be questioned by any one. The rights are of exactly the same nature and subject in exactly the same way to regulation by the State. For the same reason, there is no difference between the nature of a right to transmit property by will or as the result of death and the nature of the corresponding right to receive such property. The two rights together make possible the transmission from the dead to the living.

It is, therefore, respectfully submitted that, when it is conceded that the Federal Government may, so far as this particular objection is concerned, impose a tax upon the transmission or transfer of property of a decedent and require the tax to be paid by him who receives the property and measured by the amount he receives, there can be no plausible reason for saying that a like tax may not be imposed and cast upon the interest of the decedent, which ceased upon his death, and be measured by the value of that interest. It follows that the question now sought to be made against this tax is foreclosed by the decision in *Knowlton* v. *Moore*.

This obvious result is sought to be avoided by the suggestion that what is taxed is not the transfer to the beneficiaries but the transfer to the personal

representative, who, it is said, is an officer and the agent of the State court. The contention is that the tax, being imposed on the transfer of the entire estate, must be treated as a tax upon the transfer to the personal representative, because he is the only person to whom the entire estate goes. This statement itself is inaccurate. In the case of intestacy, the title to real estate does not pass even temporarily to the administrator. Likewise, when a will makes a direct devise of real estate the title passes at once to the devisee and does not go through the executor. There is, therefore, no passing of title to the entire estate to the personal representative.

Another fallacy in the contention is apparent when it is remembered that the tax is upon the transfer from the decedent of his property. Upon his death title to the entire estate passes from him and is transferred, whether it goes in bulk to one person or whether the estate is split up and title to different parts passes to different persons. A deed executed by a living person affects the transfer of all the property conveyed. The same deed may convey different pieces of real estate to different persons. If, however, a tax on the transfer is exacted from the maker of the deed, he must pay the tax on the full amount of property, whether it is all conveyed to one person or whether part of it is conveyed to one and the remainder to another. In either case, he has made a transfer of the entire amount of property and has become subject to the tax. For the same

reason, a tax upon the transfer by death of the property of a decedent is measured by the total amount of property so transferred, regardless of whether it is split up and transferred to a large number of persons. In the last analysis, such a tax diminishes the amount for distribution and, in this way, affects the interests of the beneficiaries, but only because the decedent at the time of his death has less property to distribute. The transfer, so far as the decedent is concerned, is one transfer by which his entire estate passes. This transfer is complete when the different parts of his estate have passed to those who, by his will or the laws of the State, are finally entitled to it.

Moreover, the fundamental fallacy in this contention is in overlooking the fact that the actual transfer which results from death is, in fact, the transfer by which the beneficiaries finally receive the property. As said by counsel in their brief, at page 68:

> It is true that beneficial title passed from the decedent at the moment of death and vested, subject to the processes and demands of administration and the rights of creditors, in his successors in interest at the same moment. His three residuary legatees (R. 3–4), although definition of their rights could not occur until the settlement of the executors' accounts and the entry of an order of distribution, took, at the instant of their testator's death, vested rights in his residuary estate, whatever it might turn out to be.

This is undoubtedly a correct statement. The beneficial title passes at once to the beneficiaries. What they will finally receive will depend upon the outstanding debts of the decedent and the demands that may be made on his estate for the purposes of administration. But whatever this value is finally determined to be, has vested in the beneficiary at the moment of the death. The transfer to the beneficiary, therefore, is accomplished when the death occurs. And it will be observed that this tax is not imposed upon that part of the estate which shall be required to pay debts or expenses of administration. On the contrary, it is measured by the value of the net estate—that is, that portion of the estate which, as a result of the death, was transferred or passed to the beneficiaries. By the very terms of the Act, therefore, the tax is not imposed upon any transfer to the personal representative or upon what is sometimes termed the "universal succession"; it is imposed only upon that which is transferred to the beneficiaries.

It is also true that the vesting of title in the personal representative is only a continuation in him of the title of the decedent for the purposes of administration. He is the agency which the State has provided for the purposes of discharging the obligations of the decedent, so that, by ascertaining the value of the net estate, the rights of the beneficiaries may be fixed and the property distributed among them. He takes no beneficial title. He holds the property for the dual purpose of discharging the obligations of the

decedent and distributing the net estate among those ultimately entitled either by the terms of the will or the laws of the State. He is merely the agent appointed, either by the decedent or under the laws of the State, for the purpose of completing the transfer to the beneficiaries which resulted from the death. His status and his function with respect to the transfer of the estate are well stated in the passage quoted by counsel at page 71 of their brief from *Blackstone* v. *Miller*, 188 U. S. 189, 204, as follows:

> Universal succession is the artificial continuance of the person of a deceased by an executor, heir, or the like, so far as succession to rights and obligations is concerned. It is a fiction, the historical origin of which is familiar to scholars, and it is this fiction that gives whatever meaning it has to the saying *mobilia sequuntur personam*. But being a fiction it is not allowed to obscure the facts, when the facts become important.

In other words, the executor or administrator stands in the shoes of the decedent. He mobilizes the estate, takes out what is necessary to pay debts and expenses of administration, and, as required by the law or directed by a will, he acts for and in behalf of the decedent by completing the transfer of the net estate to those entitled. It is this transfer which, by the terms of the Act, is taxed. The fiction that, for the time being, he holds the legal title can not obscure the fact that this temporary holding of the title, as the personal representative of

the decedent, is only a step necessary to ascertain exactly what was, in fact, transferred when the death occurred.

From a consideration of both the terms of the Act, which imposes the tax only on the transfer of the net estate, and of the nature of the functions of a personal representative, it is obvious that this is a tax simply upon the transfer of property as a result of death. And it has been seen that a taxing of this by the Federal Government is no interference with the State's right to regulate descent and distribution.

VII.

Conceding that a legacy tax imposed by the Federal Government is not a direct tax, it follows that an inheritance tax is likewise not a direct tax.

As we have seen, in *Knowlton* v. *Moore* the court found it necessary to a proper decision of the case to consider the nature of death duties in general with respect to whether they were direct or indirect taxes within the meaning of the Constitution, and reached the conclusion that, in whatever form assessed, whether as estate taxes or legacy taxes, they were taxes upon the transmission of property from the dead to the living and were indirect and not direct taxes. This conclusion was placed upon the ground that a tax which is levied "upon the happening of an event or an exchange" is an indirect tax. This being the ground upon which the conclusion was based, it would seem impossible to distinguish

in this regard between an estate tax and a legacy tax. It is admitted, of course, in view of the holding in *Knowlton* v. *Moore*, that a legacy tax is not a direct tax. But, because, in the cases heretofore decided by this court, the tax in question happened to be a legacy tax, an effort is now made to put estate taxes in a different category. The theory advanced is based upon this statement, taken from *South Carolina* v. *United States*, 39 Ct. Cls., 257, 286, a case which was affirmed by this court in 199 U. S. 437:

> A tax is obligatory; from it there is no escape. An excise is voluntary; the purchaser who would pay it cannot be compelled to purchase.

After quoting these words, counsel say (p. 143):

> In other words, no one ever finds himself in the situation which involves liability to pay an excise tax until he has voluntarily determined to exercise some right or privilege which entails such liability.

This statement is entirely too narrow. As applied to many cases, it is substantially correct. When the tax is levied upon the doing of a business, its collection is contingent upon the taxpayer doing that business. It is not an effort upon the part of the Government to exact taxes from all persons who have the right to do that business, but only from those who exercise such a right. Thus, the Federal Corporation Tax Act of 1909, 36 Stat., c. 6, p. 11, was not a tax upon all corporations, but upon all

corporations which exercised the right to do business. Liability for the tax, under the very terms of the Act, of course depended upon whether a particular corporation was exercising its privilege to engage in business. To say, however, that, when applied to a corporation actively engaged in business at the time of the passage of the Act, such a corporation could avoid the payment of the tax and would have to pay it only as a result of its voluntary act would be practically inaccurate, or, to say the least, accurate only in a highly theoretical sense. The Act was passed in August and applied to all corporations doing business at any time during the year 1909. Every corporation in the United States then doing business became liable for the tax for that year regardless of anything which it did voluntarily or involuntarily after the passage of the Act. Moreover, it was a practical impossibility for a corporation then engaged in business to escape—at least during the remainder of that year—doing things which would constitute doing business and making it liable for the tax. It would thus become liable for the tax by doing things which it could not avoid doing. It was liable for the tax, therefore, not necessarily because what it did was voluntary but because of the happening of an event—that is, the doing of business which it could not, in any practical sense, avoid doing. The point is that it became liable for the tax because the event upon which Congress had enacted that the tax should attach had occurred. And it was wholly unimportant whether the things which it did were done volun-

tarily or from stern necessity. As a matter of fact, a corporation engaged in business in August, 1909, could no more escape the payment of the corporation tax for that year upon the ground that it was not doing business than the decedent in this case could avoid dying and thereby incurring liability for this tax. In the case of the tax on the use of foreign-built yachts imposed by the Tariff Act of 1909, the owner of such a yacht could escape the tax by not using it, because the Act of Congress was construed as making the *use* and not the mere *ownership* the event upon the happening of which the tax should attach. *Billings* v. *United States*, 232 U. S. 261.

Counsel have quoted from Alexander Hamilton the following statement (p. 145):

> Imposts, excises, and, in general, all duties upon articles of consumption, may be compared to a fluid, which will, in time, find its level with the means of paying them. The amount to be paid by each citizen will in a degree be at his own option, and can be regulated by an attention to his resources.

This, however, is far from saying that no tax can be said to be an excise tax if it depends upon the happening of an event which must happen at some time and which can not be avoided by the taxpayer. It is not said that each citizen can avoid paying a tax, but only that "in a degree" he may, by attention to his own affairs, regulate the amount. Thus, in the case of estate taxes, the amount which will have to be paid depends upon the amount of property which

the decedent has accumulated and also upon the amount of wealth which he has earned that he has chosen not to expend or dispose of but to retain for the purpose of having it passed to others upon his death. The tax is imposed only in the case of those who die possessed of estates, or who have made dispositions of their property to take effect upon their death.

In most cases, the idea that a person may escape the tax by not exercising the right upon which it is imposed is theoretical rather than practical. It means merely that he has the abstract right to refrain from doing things which practical necessity compels him to do, or which, in the ordinary course of his life, he is not willing to refrain from doing. In this sense, any man can avoid the payment of an inheritance tax. All he has to do is not to accumulate an estate which will make it necessary for him to exercise his right to have it passed to others at his death. No revenue of consequence would ever be raised by the imposition of excise taxes unless those taxes are imposed upon the exercise of the right to do those things which many men throughout the country will be compelled to do if the business of the country is to continue. It is, in large measure, the things which must be done by somebody which furnish the source of excise taxes. That every man has the right not to accumulate an estate to go to others, as the result of his death, is not a very valuable right and not one, perhaps, which any man will voluntarily exercise. It is here used only for the

purpose of illustrating and emphasizing the unsoundness of the contention that an excise tax can not be made to depend upon the happening of an event which must at some time happen. Every man must die, and this is a fate which no man can avoid. But if, in anticipation of it, one has accumulated an estate, he has voluntarily exercised the right to have that estate passed to others on his death. He has voluntarily put his affairs in such shape that when his death happens, as it must at some time, it will result in a transfer of his property. Every man enjoys the right to have his property passed to others either as directed by himself or as provided by the laws of his State. He knows that his death must occur. His whole business life, either consciously or unconsciously, is directed to preparing his estate for that event. He accumulates property in order that, by his death, that right may be exercised.

It is respectfully submitted that, with regard to this question, the court was eminently correct in *Knowlton* v. *Moore* in drawing no distinction between different forms of death duties, and that excise taxes may equally be imposed upon the happening of an event which will happen only through the voluntary act of the taxpayer and upon the happening of another event which, in the course of every life, must occur. It is true that, in the case of a legacy tax, a legatee may decline to accept the legacy and thus that particular person may avoid the payment of the tax. It is also true that a person dying can not

prevent his estate passing to some one. If he has not indicated by will to whom it shall go, the law gives it direction. The difference between the two cases, however, is not real. If the legatee refuses to accept, either the will or the law of the State determines that some other person is entitled to receive it, and that person pays the tax. In such cases, the original legatee escapes the tax for the simple reason that the thing which the law says shall make him liable—the receipt by him of the legacy—has not occurred. In the case of an estate tax, however, the event which gives rise to the tax is the death of the decedent, and when he dies that event has occurred.

It is not deemed necessary to review further the cases cited by counsel as tending to support their theory that the only event which can be made the basis of an excise tax is one the happening of which is under the control of the taxpayer. It will be found that, in many of these cases, the event named by Congress was one which the taxpayer could control, and it was therefore not necessary to determine what would be the result if Congress named an event beyond his control. Moreover, it will be found that in most of the cases, as in *Nicol* v. *Ames*, 173 U. S. 509, the language referred to was used in disposing of the contention that there had been an arbitrary classification, and the courts simply held that there was nothing arbitrary in distinguishing between those who voluntarily exercised a privilege and those who refrained from doing so, and imposing the tax on one

class and not on the other. There is, we believe, nothing which has been said by this court which conflicts in the slightest degree with the conclusion reached in *Knowlton* v. *Moore* that all death duties, in whatever form, are indirect taxes, for the reason that they depend upon the happening of an event—a death—although that event is beyond the control of any human being.

It is respectfully submitted that there is now no plausible ground upon which it can be held that the tax in question is a direct tax.

VIII.

Since the tax is imposed upon the right to transmit and not the right to receive, the question as to how it affects what would otherwise be received by particular legatees or devisees is wholly unimportant.

Counsel have considered most elaborately the effect which this tax may have on what will finally be received by legatees and devisees, and, upon this, based a contention that the statute is void on account of gross and capricious inequalities. This, however, is wholly beside the case. The tax is not imposed upon the right of the legatees and devisees to receive property but upon the right of the decedent to transmit it. Its imposition, of course, diminishes the amount which will be transmitted and, therefore, the amount which may be distributed under the terms of the will or the laws of descent and distribution. But whatever remains after the payment of the tax, will be distributed strictly in accordance

with the terms of the will or the directions of the law. Congress has not concerned itself with the question as to what portions of the estate shall bear the burden. It has merely imposed a tax which must be paid out of the estate before distribution. If the owner of property desires that this tax shall be apportioned between his personal estate and his real estate, he may so direct by his will. He can not, of course, avoid the obligation which rests upon his executor to pay the entire tax. But he is at liberty to direct that, when the tax is paid, it shall be deducted entirely from the personal estate which would otherwise pass under his will; or he may direct that, in the settlement of his estate, it shall be charged entirely against his real estate; or he may direct that it shall be apportioned, in any way, he sees fit between the two classes of property. He may direct, if he chooses, that all of it shall be deducted from what would otherwise go to a particular legatee. Indeed, he may control this in any way he sees fit. In the present case the decedent has exercised this right by directing that the entire tax shall be paid out of the residuary estate. The result is that the tax must be paid by the executor. He must then pay all the specific legacies in full and suffer all real estate specifically devised to pass without diminution, provided there is enough left to pay the whole tax.

In the case of intestacy, the laws of all of the States would, perhaps generally, treat the tax as in the same class with debts of the estate, and hence chargeable

first on the personalty. Any State, however, is at liberty to provide otherwise by law. It is perfectly competent for a State law to charge such portion of the tax as it sees fit upon the real estate. If the State does not provide for such apportionment, it may be provided by the terms of the will. If not, the testator must be deemed content to leave the matter to be determined by the law of the State. The elaborate tables set out in the brief, therefore, for the purpose of showing that the practical operation of this tax is, in many cases, to diminish, by varying percentages, the amounts that would otherwise be received by different persons under the same will are wholly unimportant. In *Knowlton* v. *Moore* there was considerable discussion of the question as to whether a tax imposed on the right to receive could be measured not by the value of that which was received but by the value of the entire estate. The court refrained from determining whether such a method of measuring the tax would render the Act unconstitutional, for the reason that the Act was construed to measure the tax only by the value of that which was received by the particular legatee. The question there suggested, however, was wholly different from the question now involved. Here, the tax is not imposed upon the right to receive. It is imposed upon the right to transmit, and obviously the only logical and fair method of measuring that tax is by the value of the property to be transmitted.

IX.

State succession and inheritance taxes are not deductible for the purpose of determining the value of the net estate.

If we have succeeded in showing that the tax in question is not subject to the constitutional objections urged against it, the only question remaining is whether plaintiffs in error were properly denied the right to deduct from the value of the gross estate the amounts paid as succession and inheritance taxes in New York and other States.

It must be borne in mind that the so-called "estate tax" is not a tax on the estate itself or any part thereof. It is an excise tax imposed on the transmission of property. The language of the statute is not that the tax shall be imposed on the estate, but that it shall be "equal to the following percentages of the value of the net estate." In other words, this value is taken as a measure of the excise tax. If, as it undoubtedly is, it is a tax upon the right of the decedent to transmit his property, the logical measure to be used is the value of what he has to transmit. If, on the other hand, the tax had been assessed against the right to receive, then the logical measure would be the value of that which the particular taxpayer had the right to receive. As shown above, the tax, in this case, is not upon the right to receive, but upon the right to transmit. Not only that, but Congress expressly limited it to a tax upon that which the decedent had the right to transmit

to objects of his bounty. In fixing the value by which the tax was to be measured, therefore, and recognizing the fact that a man must be just before generous, Congress decided to exclude from the computation the value of that portion of the estate which should be necessary to discharge the debts and obligations of the decedent. In a general sense, it may be said that what a man has the right to transmit at his death, either to creditors or beneficiaries, comprises everything that he owns. Accordingly, it would have been competent to measure this tax by the value of the gross estate, but, for the reason indicated, it was decided to measure it by the net estate. Under the terms of the Act, therefore, what a man has the right to transmit to objects of his bounty is the net value of his estate at the time of his death. To determine what he thus has the right to transmit, it is necessary to ascertain how much, *at the time of his death*, would be left if all his debts and obligations were discharged, including the necessary expenses incident to such discharge. This, manifestly, is what was intended by the provisions of the Act for determining the value of the net estate. The claim that a further amount must be deducted from this net estate equal to the State and inheritance taxes paid is based upon a misconception.

It must be borne in mind that no question is now presented as to the right to deduct an estate tax imposed and collected by the State. The complaint

to which a demurrer was sustained in this case, in express language describes the taxes which it is sought to deduct as "inheritance and succession taxes." As we have seen, inheritance and succession taxes, while generally imposed on the transmission of property, are imposed specifically on the right to receive and not on the right to transmit. As a means of insuring the collection, the executor or administrator may be required to pay them, leaving him, in the settlement of his accounts, to deduct them from the legacies or devises to which they are directly applicable. Being based upon the right to receive, such taxes are measured by the value of what, without the tax, the beneficiary would be entitled to receive. Necessarily, this would be limited to his share of the estate to be distributed among beneficiaries. The amount to be distributed in a given case can not be determined until there has been taken out of the gross estate not only the amount necessary to pay debts but any tax that has been assessed against the right to transmit. Manifestly, then, inheritance and succession taxes can not be taken into consideration in determining the net value of what a decedent at the time of his death had the right to transmit. They do not accrue until taxes of the character just mentioned have been paid and the balance subject to distribution ascertained. In short, inheritance and succession taxes, being imposed on the right to receive, are not charges against the estate, but are charges against the shares which beneficiaries would otherwise receive. An effort is made, however, to

bring the deduction claimed within the terms of the Act of Congress. In order to do this, the State taxes must be classed either as "administration expenses" or "charges against the estate." That they can not be properly classed under either of these heads can not be better shown than by quoting the language of Judge Mack in the present case as follows:

> What then are the "charges against the estate as are allowed by the laws of the jurisdiction" included in clause G? Not all charges which under the laws an executor or administrator may or even must pay, whether for his own protection or otherwise, but only such charges, like all the other deductions, which affect the estate as a whole, only charges against the estate.
>
> Estate taxes or probate duties levied by the State would fall within this clause; *Northern Trust Co.* v. *Lederer*, 257 Fed. 812; but taxes levied on the shares to be received by beneficiaries, reducing not the estate but the individual's share can not be deemed a charge upon the estate merely because the duty, with the corresponding liability and right to account in respect thereto in his estate accounts, is imposed upon the executor or administrator to pay the tax before distributing the share itself. The nature of the tax as a succession, not an estate tax, remains unchanged despite the additional obligation thus imposed. (Rec., p. 13.)

This classification of the New York taxes, which it is sought to deduct, is in strict accord with the con-

struction which the New York courts have placed upon the statutes imposing them.

The bulk of the State taxes involved in this controversy were paid to the State of New York, and that they are taxes of the character just described and not charges against the estate is clearly established by the decisions of the New York courts.

In the Matter of *Penfold*, 216 N. Y. 163, speaking of the New York transfer tax, the court said (page 167):

> The transfer tax is not a tax upon property but upon the right of succession to property. (*Matter of Gihon*, 169 N. Y. 443; *Matter of Dows*, 167 N. Y. 227, 231.) It is upon the right to receive an estate or a portion thereof. The tax (so called) is the toll or impost appropriated to itself by the State for or in connection with the right of succession to property.

In the Matter of Gihon, 169 N. Y. 443, it was expressly held that the New York transfer tax was the same kind of tax that was before this court in *Knowlton* v. *Moore*—that is, a tax measured by the value of the property received and not by the value of the entire estate. The court said (page 447):

> In our judgment the vital error of this argument lies in the assumption that the "taxes are primarily payable out of the estate." The Federal tax is of exactly the same nature as the State tax; a tax not on property, but on succession; that is to say, a tax on the legatee for the privilege of succeeding to property.

(*Knowlton* v. *Moore*, 178 U. S. 41.) The Federal tax is necessarily of this character, for a direct tax, unless apportioned according to population, would be repugnant to the Constitution of the United States. Under that statute, also, it is the amount of the legacy, not of the estate, that determines the rate of taxation. Therefore, though the administrator or executor is required to pay the tax, he pays it out of the legacy for the legatee, not on account of the estate. The requirement of the statute that the executor or administrator shall make the payment is prescribed to secure such payment, because the Government is unwilling to trust solely to the legatee. No one questions that where a legacy is given for a specified amount the tax must be deducted from the amount of the legacy and the balance only given to the legatee. A testator may direct that the tax on a particular legacy shall be paid out of his estate; nevertheless, in reality, the tax is still paid out of the legacy, the effect of the direction of the testator being merely to increase the legacy by the amount of the tax.

In *Smith* v. *Browning*, 225 N. Y. 358, this construction of the New York tax act was emphasized by the holding that not only are the taxes not a charge primarily against the whole estate, but that the portion of the tax referable to each legacy was *a lien* only on that legacy. After quoting certain portions of the statute, the court said (page 366):

> The fair implication under the sentence quoted is that upon payment of the tax

> upon a specific legacy the beneficiary is entitled to the possession of the money or property specifically bequeathed, and in the event of a refusal of the executor to deliver the same he may be compelled to do so.

It can not be doubted, therefore, that, in New York, there is no transfer tax which is a charge against the estate.

There is a transfer tax which the executor or administrator is required to pay, but when he pays it he pays it not for the estate but for the devisees and legatees. This is in entire harmony with what was said by this court in *United States* v. *Perkins*, 163 U. S. 625. The question in that case was whether the transfer tax could be required in the case of a legacy to the United States. It was said at page 630 of the opinion:

> * * * the act in question is not open to the objection that it is an attempt to tax the property of the United States * * *. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it.

If the tax operates directly to diminish the legacy, it necessarily is paid out of the legacy and not out of the general estate. The effect of such a tax is that, finding that the will contains a legacy of a certain amount, which is subject to a transfer tax, the executor must pay a part of that legacy to the

State and the remainder to the legatee. The payment so made in either case does not become a charge against the estate, but is rather a part of the distribution of the estate.

The question presented, therefore, is whether, before determining the value of the net estate at the time of the decedent's death, upon which there is based a tax upon the right to transmit, there must be deducted some other tax which will thereafter have to be paid out of the various legacies and devises. To state this proposition would seem to be to answer it.

If, however, the two taxes were of the same kind, that is, if both the Federal Government and the State had levied a tax on the right to transmit, and each had provided that the tax should be measured by what the decedent had to transmit to objects of his bounty—the net value of his estate—it would by no means follow that, in order to ascertain the net estate for the purposes of either tax, the amount of the other tax should be deducted. On the contrary, we would have a case where two governments, with an equal and coordinate power to tax the same thing, had adopted as the measure of its tax the net value of the estate subject to transmission. It is a mere play upon words to say that in such a case either government would be imposing a tax upon a tax paid to the other. Neither would be levying a tax upon the estate itself. Each would be exacting

a tax equal to a certain percentage of that which was about to be transmitted.

The principle is the same where both the Federal and a State Government impose a tax upon a man's net income. Each may determine the net income in exactly the same way. Each requires a payment based upon the same sum. It was upon this principle that the New York court in the *Matter of Gihon*, 169 N. Y. 443, held that the Federal legacy or succession tax of 1898 was not deductible in order to ascertain the amount upon which a similar tax was imposed by the State. The court held that the two taxes were of exactly the same nature and must be computed on the same value. Of course, a different rule would have applied if one of the taxes had been an estate tax, which must be paid before the amount for distribution and, therefore, the amount to be received by the legatees and devisees could be ascertained. In such cases, of course, the estate tax is first deducted, and the legacy tax is imposed on the amount to which the legatee is entitled after the estate tax has been deducted from the net estate. In the present case it happens that the estate tax—that is, the tax which must be paid before the share of the legatee can be ascertained—is the tax levied by the Federal Government.

It is said, however, that the fact that these executors were allowed credit in the settlement of the estate for the amount of State inheritance and succession taxes paid, indicates that the taxes were charges against the estate allowed by the laws of

New York. In view of what has been said, this can have no significance. For the purpose of insuring the collection of the taxes, the executors were required to pay them. Of course, they were entitled to credit in their settlements for these payments. The payments, however, did not decrease the amount of the net estate at the time of the death of the decedent. On the contrary, they constitute payments made to the State of a portion of the sums which, but for the imposing of the tax, they would have been required to pay in the distribution of the net estate to legatees and devisees. As a matter of fact, the decedent contemplated the payment of such taxes and, not desiring to diminish the amount of the specific legacies, directed that the payments should be made out of the residuary portion of his estate. As said in *Matter of Gihon*, 169 N. Y. 433, above referred to, the effect of this direction was to increase the amount of each legacy to an amount sufficient to pay the tax and leave the original legacy intact.

It is also said that Congress intended to impose the tax in respect of only so much of the decedent's estate as should pass to those beneficially entitled. On the contrary, as we have seen, the only purpose that can be imputed to Congress is to impose the tax in respect of so much of the decedent's estate as should be subject to distribution under the terms of the will and the laws of the State. The decision in *Lederer* v. *Northern Trust Co.*, 262 Fed. 52, is not, except in one particular, in conflict with what has been said. There

it was held that the Pennsylvania State tax was deductible in computing the Federal estate tax, for the reason that the courts of the State had held that the tax was, in effect, rather an estate than an inheritance tax, and this interpretation was controlling. It is believed that this conclusion was erroneous, because, the two taxes being of exactly the same nature, it should have been held that neither was deductible from the estate in computing the other, but that both should be computed upon the value of the same net estate. This error, however, if it was error, does not affect the present controversy, because the fair inference from *Lederer* v. *Northern Trust Co.* is that if the State tax had been a legacy or succession tax, as in this case, the deduction would not have been allowed.

But it is said that any other interpretation than that above suggested would result in producing inequality and injustice. The inequality and injustice referred to, however, is that, because of the varying laws of different States with respect to the amount of death duties involved, the percentage of the amount actually received by individual beneficiaries which the Government would exact under this Act would be very much greater in some States than in others. The answer is that the Federal Government exacts precisely the same percentage of the net estate in every State in the Union, and, so far as its own laws are concerned, provides for absolute equality. If any inequality occurs, it is because the laws of the States differ. This inequality of burdens is inevita-

ble unless all the States adopt uniform laws on this subject.

If Congress had provided that State death duties should be deducted from the net estate, actual inequality in the operation of the Federal law itself would have resulted. We may suppose two cases: A person living in New York dies leaving a net estate of a million dollars. Without stopping to inquire the exact amount of death duties exacted by that State, we may suppose it to be $50,000. If this is to be deducted, the Federal estate tax would be based on $950,000. We may suppose a citizen of another State dying possessed of a net estate of a million dollars. It happens in that State, however, that the death duties exacted amount to $200,000. The Federal estate tax, therefore, would be based on $800,000. The result would be that the United States, demanding death duties with respect to the transmission of two estates of exactly the same value, would receive one sum in one case and a very much greater sum in the other. It is no wonder, then, that Congress, when it found that in most of the States death duties were exacted in the form of inheritance and succession taxes, and desiring to make the rule of Federal taxation uniform, determined to impose the tax upon the right to transmit rather than the right to receive. When it did this, it imposed a tax which had to be paid out of the gross estate in order to determine the value of the estate to which the right of succession attached. Under this rule, there may be great inequalities in the combined

Federal and State taxes, but there is certainly uniformity in the Federal taxes themselves.

It is said that the death duties paid in States other than New York are paid in respect of the universal succession of personal representatives, and must therefore be charges against the estate within the meaning of the statute. The fallacy in this statement is, as we have seen, that succession taxes are not imposed upon the transfer to the personal representative but upon the final transfer to the beneficiaries. Where the property is in a State other than the domicile of the decedent, the laws of that State may require the payment of the succession or inheritance tax before it passes to the administrator or executor. In such cases, as said in *Maxwell* v. *Bugbee*, 250 U. S. 525, the tax is "to be paid upon turning it over to the administrator or executor at the domicile of the decedent (p. 536)." But it must be remembered that the executor who receives such property receives it for those who are entitled to succeed to it. He pays the tax for the beneficiaries and the payment diminishes the amount which they finally receive in exactly the same way that he receives property of the decedent in his own State and diminishes the amount which the beneficiary is to receive by the amount of the tax to which the State subjects it. The accident that some of the property may be in another State and that that State has the power to require the tax to be paid before the property is turned over, in no way, alters the fact that

the personal representative merely stands in the shoes of the decedent and collects the latter's property for the purpose of distribution. The tax, in both instances, is on the right of the ultimate beneficiaries to receive the property as the result of a transfer occasioned by the death of the decedent and completed by the distribution of his estate.

Finally, it is said that, because the Act of February 24, 1919 (40 Stat., c. 18, p. 1057), expressly provided that succession, legacy, or inheritance taxes should not be deducted, Congress must be presumed to have construed the Act of 1916 as permitting such deductions. This, however, by no means, follows. When the Act of 1919 was passed there had, as shown by brief of counsel, been conflicting rulings made by the internal revenue department. Its final ruling, to the effect that such deductions should not be allowed, was then the subject of litigation pending in the courts in cases shortly thereafter decided. The construction of the Act of 1916 was then in dispute, as Congress must have known. The fair inference is that the purpose of the Act of 1919 was to settle that dispute by expressing the legislative purpose in language that could not possibly be misunderstood. This, as has frequently been held, is the inference naturally to be drawn from a change made in an Act of Congress when an actual dispute as to the meaning of a former Act is pending.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the District Court sustaining the demurrer is correct and should be affirmed.

WILLIAM L. FRIERSON,
Solicitor General.

MARCH, 1921.

Office Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 286.

NEW YORK TRUST COMPANY and ALBERT W. PROSS, as executors of the last will and testament of J. HARSEN PURDY, deceased,

Plaintiffs in Error,

vs.

MARK EISNER, Collector,

Defendant in Error.

BRIEF ON BEHALF OF STATE OF MINNESOTA, SUBMITTED BY ITS ATTORNEY GENERAL AS AMICUS CURIAE.

CLIFFORD L. HILTON,
Attorney General,
EGBERT S. OAKLEY,
Assistant Attorney General,
For Minnesota.

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STATEMENT.

In the case above entitled there has been drawn in question the constitutionality of the act of Congress of September 8, 1916, (39 Statute 777), gen-

erally known as the Estate Tax Act, and its validity has been assailed upon several grounds, among others, upon the ground that the act "attempts to levy a tax upon the operation of the laws of the several states, and to diminish and impair the exercise by the several states of their exclusive constitutional right to control and regulate the administration of the estates of decedents."

The state of Minnesota will necessarily be affected by the decision of this court upon the question raised by the ground of attack above quoted. It is not interested in the discussion of any other grounds of alleged invalidity of the law. Hence, this brief submitted on behalf of the state will be limited solely to a discussion of the proposition whether or not the act in question by its operation and effect, so far invades the field of its exclusive jurisdiction in the matter of successions, as to burden, interfere with or impair its power of regulation in that field.

There is, of course, no thought or intention on the part of the state to claim or contend here that because the power of regulation of successions is vested in the states, the United States may not tax transfers of property effected by death. The power to do so on the part of the Federal Government is fully acknowledged so long as its exercise is so provided for as not to invade the powers of the states' regulation, which for obvious constitutional reasons, must remain forever inviolate.

Were it possible, by any reasonable construction of the act, to so restrict its operation as to avoid the results here complained of, there would, of course, be no valid objection to this act on the part of the state, but because we believe that a serious invasion of the state's exclusive right of regulation is inevitable if the act is to be given the operation intended by Congress, we deem it our duty to submit to the serious consideration of this court the contentions upon which this conclusion is reached, knowing full well that this Court would not hesitate to protect and preserve inviolate the reserved power of the states involved in the operation of this act.

ARGUMENT.

Before undertaking to show the operation of the act in question it is well to call the attention of the Court to some of the well settled principles of constitutional law which bear directly upon the solution of the main question here, and which may be summarized as follows:

First: The Federal Government is supreme within the scope of its delegated powers, and the State governments are equally supreme in the exercise of those powers not delegated by them nor inhibited to them and that when these supreme functions are exercised by the Federal and State governments within their respective limitations, they never come into conflict.

Second: But if either government enacts a law upon a matter which is within the exclusive concern and power of regulation of the other, the validity of such law depends upon the supremacy of the power by which it was enacted.

Gibbons vs. Ogden, 9 Wheat. 1, 199-205.

License Cases, 5 How. 504-588.

Third: The United States, not possessing, as the States do, the right to regulate successions, when the United States calls into play its taxing power over the subject of the passage or receipt of property by death, the extent of its authority is to

be measured solely by the scope of the taxing power conferred by the constitution.

Knowlton vs. Moore, 178 U. S. 41.

Fourth: While the taxing power of Congress extends to all usual subjects of taxation, including receipt or transmission of property occasioned by death, yet its power to tax, cannot be so exercised, in the constitutional sense, as to impose burdens on the exclusive power of the states to regulate successions.

Knowlton vs. Moore, 178 U. S. 41, 59, and cases cited.

Fifth: Whether an exercise of the taxing power by Congress, as manifested by the act in question, does or does not burden or impair the States' power of regulation of successions, depends upon the operation and effect of the act as enforced, and not upon the manner in which the taxing scheme has been characterized.

Western Union Teleg. Co. vs. Kansas, 216 U. S. 1.

Galveston vs. Texas, 210 U. S. 217.

Gloucester Ferry Co. vs. Pennsylvania, 114 U. S. 196.

2. Difference between "Estate Tax Act" and the Act involved and construed in Knowlton vs. Moore, pointed out.

Before discussing the application of the principles above stated, it is proper at the outset to examine the salient provisions of the Estate Act in question, which give rise to the main question under consideration. The full text of the act will be found in the appendix at the end of this brief.

By section 201 of the Act, a tax equal to certain percentages of the value of the net estate to be determined as provided in Section 203, is imposed upon the "transfer of the net estate" of every decedent dying after the passage of this act.

By Section 202 the value of the gross estate is determined by including the value at the time of his death, of all property wherever situated, to the extent of the interest of the decedent at the time of his death, which, after his death, is subject to the payment of the charges against his estate and the expenses of his administration, and is subject to distribution as a part of his estate; including also any interest of which the decedent had, at any time, made a transfer, in contemplation of death or to take effect at death, and also to the extent of any interest of certain jointly held property.

By Section 203 it is provided that for the purposes of the tax, the value of the net estate shall be determined by deducting from the value of the gross estate, certain amounts for funeral expenses,

administration expenses, claims against the estate, etc., and a specific exemption of $50,000.

By subsequent sections a tax is made due and payable within one year after the decedent's death, and penalties are provided for its non-payment within due time. The executor is required to make a return to the collector containing certain detailed information as to the value of the estate, the deductions allowed by the act and the value of the net estate, and the Commissioner of Internal Revenue is by law directed to make all assessments of the tax under the authority of the existing provisions of law relating to the assessment and collection of taxes. The executor is required to pay the tax to the collector, and the collector is required to grant to the person paying the tax duplicate receipts which shall entitle the executor to be credited and allowed the amount of such tax by any court having jurisdiction to settle his accounts.

By Section 208, if the tax is not paid within 60 days, the collector is required to bring suit for the enforcement of the tax and by said section it is provided that "it being the purpose and intent of this title that so far as is practicable, and unless otherwise directed by the will of the decedent, the tax shall be paid out of the estate before its distribution."

By section 209, it is provided that the tax shall be a lien for ten years upon the gross estate of the decedent and by subsequent sections all general provisions of law for the assessment and collection

of taxes are made applicable, and the commissioner of internal revenue with the approval of the Secretary of the Treasury, is directed to make such regulations as he may deem necessary to carry out the provisions of said act.

A cursory examination of the Act reveals the fact that the tax is imposed upon the "transfer of net estate," *without reference to the persons to to whom the property passes, or the amount of benefit taken by them, but is levied indifferently, whether they are relatives of the decedent or strangers in blood, and without reference to any settled policy of any state in the regulation of successions.* It seizes upon the net estate *en masse*, as a unit for taxation, graduated according to the value of the entire net estate, *and the tax does not at all depend upon the way in which the property passing becomes distributed upon the death of the owner.*

That such is the manifest intention of the act, is confirmed by the Regulations No. 37, promulgated pursuant to the provision of the act, reading as follows:

> "ARTICLE I. Neither a property nor a legacy tax. The Federal Estate Tax is imposed upon the transfer of the net estate, determined in the manner prescribed, of every person dying after September 8, 1916. The tax is not laid upon the property, but upon its transfer from the decedent to others. The subject of tax is the transfer of the entire net estate not any particular legacy, devise, or distributive share. It is not an individual in-

heritance tax. The value of the separate interests and the relationship of the beneficiary to the decedent have no bearing upon the question of liability or the extent thereof. The transfer of property is taxable, although it escheats to the State for lack of heirs.

"ARTICLE 11. Nature of transfer.—The statute embraces transfers by will or under the intestate laws, and also transfers made by the decedent in his lifetime, when made in contemplation of death or intended to take effect in possession or enjoyment at or after his death. The statute also enumerates certain special cases not strictly of either character just described. The practical test of the existence of a taxable transfer is whether the statute directs that the property in question be included in the gross estate.

ARTICLE 46. (Which has reference to the deductions authorized by Sec. 203 of the Act); * * * 'No estate, succession, legacy or inheritance tax is deductible.'"

and by the state decisions where the question was directly involved.

In re Hamlin, 226 N. Y. 407, 124 N. E. 4; 7 A. L. R. 701 and note.

Plunkett vs. Old Colony Trust Co., 233 Mass. 471, 124 N. E. 265, 7 A. L. R. 696.

Knight's Estate, 261 Pa. St. 537-538.

In the cases above cited, the courts, construed the act as one imposing an "Estate Tax" as distinguished from any inheritance or succession tax; that is

to say, that the tax is on the interest that ceased by reason of death, and not on the interest to which some person succeeds at death.

The distinction between the character of the two kinds of taxes was clearly pointed out in the case of *Knowlton vs. Moore*, 178 U. S. 41, where the court quoted approvingly from Hanson's Death Duties; referring to the estate duty imposed by the English finance Act of 1894:

> "What it taxes is not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death."

And in sustaining the tax in the *Knowlton* case, as a tax on passing of a legacy, to be measured by the value of each separately determined legacy or share, the court, in rejecting constructions of the act, which would measure the tax upon each legacy by the whole value of the personal estate, said:

> "Indeed, the confusion which gives rise to both of the constructions of the statute which we have just considered comes from the want of insight pointed out by Hanson in a passage which we have heretofore quoted; that is, it arises from not keeping in mind the distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death, the two being different objects of taxation."

The court will observe that in the respect referred to this act is fundamentally different from any state inheritance tax law, or any federal law here-

tofore existing. It is unique in the feature of imposing a tax upon the estate itself, instead of on each distributive share. It seems to have been framed without any reference to prior federal or state legislation on the subject. In whatever aspect regarded, it is obvious that the act is radically different from the one considered and involved in *Knowlton vs. Moore*, 178 U. S .41.

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3. APPLICATION OF CERTAIN PRINCIPLES MADE IN *Knowlton vs. Moore*, DISCUSSED AND ANALYZED.

In this connection, and before proceeding more in detail with the question of the effect of operation of this act upon state's power, it is proper here to consider the application of principles upon which the decision in *Knowlton vs. Moore*, was rested, as against the objection that the tax there involved, burdened the states power of regulation.

The consideration of the *Knowlton* case seems also desirable at this point, because it is believed that the opinion of the court in that case has been misunderstood and misinterpreted.

The *Knowlton* case, in our view, has been decided with due regard for the principles of constitutional law stated at the head of this argument, and the argument here is founded upon the application of the same principles, respecting the limitations of powers of respective governments, as were discussed in that case.

At the outset it should be observed that in the *Knowlton* case, the tax was not an "Estate Tax," but a tax on "legacies and distributive shares." In the Knowlton case the subject of taxation was the "transmission or receipt of property occasioned by death," and the argument of counsel that the tax there imposed cast a burden upon the state's exclusive power of regulation was based upon the assumption that the tax on the "transmission or receipt of property occasioned by death" is imposed on the exclusive power of the state to regulate, overlooking the important circumstance, as stated by Mr. Justice White in the opinion, that "the thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the *transmission or receipt*, and not the right existing to regulate."

The fallacy of that argument was clearly pointed out by Mr. Justice White in his opinion (178 U. S. 59-60). This fallacy consisted in the assumption that the two governments finding exercise of their powers through measures of the same description, must come in collision solely because the subject matter of the tax imposed by Congress was at some time or some point within the state power of regulation, overlooking the important fact, that at some point the power of the states to regulate becomes expended and regulation ceases, and that thereupon an object or a subject arises which is introduced through the medium of the states power of regulation and becomes open to the taxing power of Con-

gress. That this must be so is clearly evident from the conclusion drawn in the opinion in the course of which Mr. Justice White said (178 U. S. 69):

> "Certainly a tax placed upon an inheritance, diminishes to the extent of the tax, the value of the right to inherit or receive, but this *is a burden cast upon the recipient*, and not upon the power of the state to regulate."

In reaching this conclusion, the court first conceded that the power of regulation resides in the states and not in Congress, and that Congress may not interfere with nor burden an exclusive power of the states. It must be obvious therefore, that the tax was sustained in the Knowlton case, solely upon the principle of the recognition of the state's power of regulation, *as a factor in the transmission or the receipt of the legacy*, and that the power of Congress to tax successions, may be given full play, only at the point when the power of state regulation has ceased. The application of the same principle is illustrated by a variety of cases in this court, involving validity of state enactments, obnoxious to the exclusive power of Congress to regulate interstate commerce, or inhibiting the states from taxing imports.

Gibbons vs. Ogden, 9 Wheat. 1, 199-205.
Brown vs. Maryland, etc., 12 Wheat. 419,
Welton vs. Missouri, 91 U. S. 275.
Leisy vs. Hardin, 135 U. S. 100.

In *Brown vs. Maryland*, supra, the court, while recognizing the difficulty in drawing the line of

distinction between the restriction upon the power of states to lay a duty on imports, and their acknowledged power to tax persons and property, (saying that the two, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them) laid down the principle that the power of one government to tax cannot be brought into play, until the power of regulation of the other has been so far expended, as to introduce a new taxable object open to both.

So in *Welton vs. Missouri*, supra., this court denied the validity of state enactment levying a tax on sale of goods, upon the ground that it was a tax on the goods themselves and was therefore a burden upon the interstate commerce, and that the exclusive power of Congress to regulate commerce extended to and protected the goods from state taxation even after the property had entered the state, and until it has mingled with and become a part of the general property of the country.

So in *Leisy vs. Hardin*, 135 U. S. 100, supra., a law of the state of Iowa which forbade the receipt of an imported article, or its sale, was held in violation of the power of Congress to regulate commerce; that such power protected the property until it was received at the destination and sold in original packages and that to hold otherwise, is to burden the commerce.

Many other cases familiar to the court may be cited to the same effect, but the principle enunciated in all of them, which bears directly upon the reasons for the decision in Knowlton case, is precisely the same. That principle is that with reference to any usual subject of taxation, when the exclusive power of one government to regulate the particular matter shall have been exhausted or expended, the power to tax may extend to both governments to such a new subject. It is only when the principle considered is thus viewed that the respective powers of the two governments, having no claim to identity, and between which no analogy may be drawn, may find expression, each within its proper sphere, and have operation to the attainment of its own particular ends, without conflict nor interference by one of any right or authority of the other.

Thus it is, that when the court found in the Knowlton case by the application of the principle last discussed, that the "transmission or receipt of property by death" was the usual subject of taxation open to both governments, the conclusion was inevitable that no burden was cast upon the state's power of regulation. But the finding by the court that the burden was cast upon the recipient and not upon the state power could be justified only upon the theory that the states power of regulation was in no way involved in the particular subject of the tax; or that the power of states regulation no longer extended to the particular subject, or,

that the rights or privileges with which the power of the state had concern, had found consummation in the subject taxed before the incidence of the tax. In other words, the finding of the court that the burden was cast upon the recipient was not the reason for finding that no burden was cast upon the state, but a necessary conclusion from the previous determination that "transmission or receipt of property occasioned by death" was at the time of the incidence of the tax a usual subject of taxation upon which, the power of regulation of the state has been consummated. Upon no other theory is it possible to reconcile the Knowlton case with the principles of constitutional law. If the question of the invasion of the exercise of an exclusive power of one government by the other was to be tested, by the determination of the sole fact of the burden of the tax falling upon the persons immediately concerned then such cases as *Brown vs. Maryland*, *Western Union vs. Kansas*, *Galveston vs. Texas*, were all wrongly decided. Thus the argument in Brown vs. Maryland, that the burden was on the importer because he must pay the tax, in Western Union vs. Kansas, that the burden was on the telegraph company because it must pay the tax, or in Galveston vs. Texas that the burden was on the Railway Company because it must pay the tax, and that therefore no burden would be conceived to be cast upon the power of Congress to regulate interstate commerce, should have prevailed, but in each of those cases the fallacy of such

argument was exploded and the question of the invasion or burden of the exclusive power of the federal government was determined by other considerations in conformity to the principles above referred to.

It must be conceded in any event, that had the court found in the Knowlton case that the act there involved was a burden upon the power of the state regulation of successions, the decision of the court would have been the other way, which makes obvious the conclusion that the Knowlton case is not an authority for the proposition that Congress can tax transfers of property effected by death, regardless of the effect of such taxation upon the state power of regulation. On the contrary, in reaching the conclusion as the court did, that the burden was cast upon the recipient and not upon the state power, the decision stands as an entirely consistent authority for the proposition that Congress cannot so tax successions as to cast a burden upon the states exclusive power of regulation. It should not be overlooked in this connection that the conclusion of the court as to the casting of the burden upon the recipient was of the very essence of the decision, is put beyond doubt by the dissenting opinion of Mr. Justice White in Snyder vs. Bettman, 190, U. S. 249-258, where referring to his conclusion in the Knowlton case, that the burden was cast upon the recipient and not upon the states power, he said: "This conclusion was absolutely essential to the construction of the statute in Knowlton vs. Moore."

Now the very question for decision here is whether a burden is cast upon the power of the state to regulate successions, and this question cannot be answered merely by saying, that because in the Knowlton case, it was held that no burden was cast upon the state, therefore no burden can be said to be cast upon the state by the act under consideration.

As already noticed, the acts are radically different, and are designed to have wholly different operation; therefore, while the Knowlton case is decisive on the question of casting of burden by the act there considered, it did not involve the question as to whether a tax levied by Congress upon the mass of the estate, regardless of its destination, and in utter disregard of any state policy of regulation of successions, can be said to be a valid exercise of the taxing power of Congress, when the operation and effect of the act is shown to have direct effect upon the state power. In other words, when the court decided in the Knowlton case, that the tax was upon the "transmission or receipt of property occasioned by death," *thus giving full effect to state power of regulation, by which a new object was introduced, open to taxation by Congress*, the conclusion that no burden was cast upon the state power was inevitable, since no burden upon state power could be conceived, when the object of taxation was found not to be a subject of the state's power of regulation, when intercepted by the tax.

4. THE QUESTION OF BURDEN OF STATE POWER OF REGULATION OF SUCCESSIONS MUST BE DETERMINED BY THE MODE OF THE IMPOSITION OF THE EXACTION, AND ITS OPERATION AND EFFECT AS ENFORCED, AND NOT BY MERE NAME OR CHARACTERIZATION OF THE PARTICULAR TAX.

Here the subject of the tax and the manner of its imposition, being radically different from that involved in the Knowlton case, the question whether the act does impose a burden or interfere with the state power of regulation, must be determined by the effect and operation of the act as enforced and not by the name given to the tax, and if in the manner and effect of its operation, it is shown to impair, interfere with or burden the state's power of regulation, then the act cannot be regarded as a lawful exercise of the taxing power of Congress, and its invalidity cannot be saved by the mere name or characterization which the act gives to that particular tax.

That this is the true test to be applied to the act in question is illustrated by the many cases decided by this court, involving the validity of state enactments, with respect to their operation and effect, as a burden upon the power of Congress to regulate interstate commerce.

The subjects of taxation in all these cases, are generally either the privileges of exercising corporate franchises within the state, or the property employed in their business—all usual subjects of

taxation, within the acknowledged taxing power of states. Yet, because of the exclusiveness of the power of Congress to regulate commerce being involved, this court invariably looked beyond the particular characterization of the tax, and determined the question of the burden on comerce power, *by the operation and effect of the act as applied and enforced*, and not by the name given to the tax.

Western Union Telegraph Co. vs. Kansas, 216 U. S. 1;
Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196;
Philadelphia & S. Mail S. S. Co. v. Pa. 122 U. S. 326;
Meyer v. Wells, Fargo & Co., 223 U. S. 298;
Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217;
Fargo v. Hart, 193 U. S. 490;
International Paper Co. vs. Massachusetts, 246 U. S. 135;
Looney vs. Crane Co. 245 U. S. 178;
Kansas City vs. Botkin, 240 U. S. 227.

As was said in Kansas City, F. S. & M. R. Ry. v. Botkin, 240 U. S. 231, in discussing whether a state exaction burdened the interstate commerce power of the national government:

> "In determining whether a tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce clause, our decision must regard the substance of the exaction—its operation and effect as enforced—and cannot depend upon

the manner in which the taxing scheme has been characterized."

And again, in Mugler v. Kansas, 123 U. S. 623:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, and under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority."

In Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, which involved the validity of Texas Statute, imposing an annual tax equal to one per cent of gross receipts on each railroad lying wholly within the state, the court, in condemning the statute said:

> "Neither the state courts, nor the legislatures, by giving the tax a particular name, or by the use of some form of words, can take away our duty to consider its nature and effect."

Again in Ashley v. Ryan, 153 U. S. 436, the court said:

> "Whether the charge be viewed as a tax, a license or a fee, if its exaction violated the interstate commerce clause * * * or involved the assertion of the right of a state to exercise its powers of taxation beyond its limits, it was void, whatever might be the technical character affixed to the exaction."

Again in St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350, 363, the court said:

> "We must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced."

It thus appears that in considering the question of burdening the state power of regulation by the act in question, it is not so important to look at the name given to the tax by the act, as it is important to look into the operation and effect of the act, as it bears upon the State's exclusive power of regulation. But, manifestly, before the operation and effect of the act, can be properly exposed to view, we must first ascertain the function, scope and extent of the state power in question, so as to intelligently inquire whether and to what extent it is or will be burdened or interfered with, by the federal enactment in question.

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5. The Scope and Boundaries of State Power of Regulation.

Upon this phase of the question, what was said by Chief Justice Marshall in Gibbons vs. Ogden, *supra*, in defining "regulation" is in point:

> "To regulate implies in its nature full power over the thing to be regulated; it excludes necessarily the action of all others that would perform the same operation on the same thing." * * * A regulation when adopted is designed for the entire result, and the production of a uniform whole."

This court will notice judicially that at the time of the pasage of the Estate Act, Congress found the several states in the exercise of their respective powers of regulation, by the enactment of laws, intended to operate upon the devolution of property effected by death. In doing so, each state has the exclusive right to prescribe the conditions, attach privileges or grant exemptions, as it sees fit, to the exercise of the right to transmit or to receive property on death.

That such regulation, in whatever form it may be exercised by each state, is designed for the entire result and the production of a uniform whole is but a necessary deduction from the nature of the power itself; and that such power must be allowed full exercise, without interference of another government, for the consummation of its purpose, is of the very essence of the power itself.

That the power to regulate descent and succession of property on death is a sovereign power, and belongs exclusively to the states, is so well attested by a variety of cases decided by this court, that it seems unnecessary to do more than to cite a few of them by way of illustration.

United States v. Fox, 94 U. S. 315.
Yonley v. Lavender, 21 Wall. 276.
Chanler v. Kelsey, 205 U. S. 466.
Blackstone v. Miller, 188 U. S. 189.
Maxwell v. Bugbee, 250 U. S. 525.
Tilt v. Kelsey, 207 U. S. 43.
United States v. Perkins, 163 U. S. 625.
Mager v. Grima, 8 How. 490.
Byers v. McAuley, 149 U. S. 608.

Manifestly, if regulation is designed "for the entire result and the production of uniform whole" as stated by Chief Justice Marshall in the Gibbons case, then the boundaries of that power must be co-extensive with the attainment of such entire result, and since the power is admittedly both sovereign and exclusive, the state may impose any conditions it sees fit, in the exercise of that power, before the designed result is produced, without interference or embarrassment by another government. Hence it is that this court has repeatedly said, that the so-called succession or inheritance tax enactments by several states was but an exercise of the power of regulating the devolution of property by death.

Mager v. Grima, 8 How. 490.

Magoun vs. Illinois Trust Co., 170 U. S. 283, 289, 290.

Carpenter v. Pennsylvania, 17 How. 456.

United States v. Perkins, 163 U. S. 625.

The point we wish to make here is that death duties, under whatever name, imposed by the several states, while in some aspects may be regarded as taxes, exacted in the exercise of power of taxation, yet in their essence, as attested by the cases decided by the court, all such laws may be and are generally sustained, as manifestations of the exclusive power of regulation. This consideration is important, as marking sharply the boundaries between a *mere power to tax* (possessed by Congress in the matter under consideration) and a tax by a

state imposed as a measure adopted in the exercise of a sovereign power of regulation. The distinction between the two makes obvious the limitations of the federal government to *tax* "usual subjects of taxation" in the exercise of taxing power and a like measure adopted by a state in the exercise of its power of regulation.

The cases cited in support of the proposition that a state succession or inheritance tax, is but a measure adopted in the exercise of the power of regulation, are all illustrations of the application of the same principle in another line of cases involving the reverse proposition, namely, that of the encroachment of the state power to tax "usual subjects of taxation" upon subjects which at the time, are within the exclusive power of Congress to regulate. In all such cases as already noticed, this court has never hesitated to condemn the tax by whatever name, or combination of words, it might have been characterized, as soon as it found that the particular subject attempted to be taxed by the state, was at the time subject to the regulating commerce clause. Among the large number of cases already cited on the proposition just mentioned, this court in *Philadelphia & Southern Steamship Company vs. Pennsylvania*, 122 U. S. 326, where the right of a state to tax gross receipts of an interstate steamship company was involved, and was defended upon the ground that the tax was not on commerce, did not hesitate to say:

"It cannot be pretended that the state could constitutionally regulate or interfere with that

commerce itself. *But taxing is one of the forms of regulation. It is one of the principal forms.*" 122 U. S. 326, 336.

That statement by the court is pertinent here, not only as indicating that taxation is one of the principal forms of regulation, but also that taxation by way of regulation belongs *exclusively* to the sovereign possessing the power of regulation, and may not be usurped or interfered with by another government. Further illustrations of such regulation by way of taxation may be found in that line of cases decided in this court (collected in 12 Corpus Juris, p. 98 Sec. 128) where a tax by a state was attempted to be exacted upon property while in transit from one state to another. This court invariably condemned the tax, whether the tax is laid by the state of origin, or the state of destination, upon the ground that in one case the protection of the commerce clause has attached, and in the other such protection has not ceased.

It being manifest that regulation of successions is designed as well as exerted to produce certain results, it must deal with all the property within the state's dominion. It is designed to define and specify the rights of those who succeed to property in death, and the proportion each shall take, as well as to impose conditions on such taking, and while revenue is an incident to such regulation, it is obvious that the ultimate object of the power, is to define and determine the manner, the tenure, and the conditions upon which all property within the

state's jurisdiction may be acquired or received on the occasion of death.

It is inconceivable that the results thus to be produced in the exercise of exclusive regulation can be produced by a sovereign government otherwise than by entire freedom of action, and as this power of regulation from its very nature is brought into exercise at the very point of death, its exclusiveness and freedom of action begins at that point, and must obviously continue until the specific rights and interests of the successors are produced and defined, in accordance with rules prescribed by such regulation. Therefore, "the interest that ceases on death" is the primary thing with which the power deals, and the right or privilege of the owner to transmit it on death, or the exercise of that right, is the very first step in state regulation, or the inception of regulation.

For the federal government to step in and impose an exaction at any point between the inception of regulation, and until the full rights of successors are defined and produced, is, on principle, just as much an usurpation of the power as it is for a state to impose a tax upon property *in transit* from one state to another, whether such tax is laid by the state of origin or the state of destination.

6. THE EXACTION ATTEMPTED TO BE IMPOSED BY THE ACT OF SEPTEMBER 8TH, 1916, WHETHER CONSIDERED AS ATTACHING TO THE INTEREST THAT CEASES AT DEATH, OR AS ATTACHING TO INTEREST TO WHICH SOME PERSON SUCCEEDS AT DEATH, BY ITS OPERATION AND EFFECT AS ENFORCED, IS A FORM OF REGULATION OF SUCCESSIONS, AND DIRECTLY INTERFERES WITH AND CASTS A BURDEN UPON STATE POWER OF REGULATION.

As already noticed, in determining the question whether the exaction here has such relation to, or bearing upon, the state regulation of succession, as to amount to exercise of the power prohibited to Congress, we must regard the operation and effect of the exaction, and not the name by which the taxing scheme has been characterized. In this aspect, therefore, it is not important whether the exaction is by the act intended to attach to the interest that ceases at death, or to the interest to which some person succeeds on a death, if in either case by its manner of imposition and enforcement, it operates as a form of regulation of successions, or interferes with or burdens the paramount power of the state regulation.

It is manifest in any aspect, that the exaction imposed by this Act is some kind of a death duty which concerns property of a decedent, but its imposition, accrual and enforcement is not postponed to the time of the ascertainment or emergence of

any specific beneficial interest in successors, and in this respect as already noticed, it is radically different from any federal death duty heretofore considered by this court. What then is the operation of this act?

By Section 201, the tax is levied upon the "transfer of net estate" which is specifically defined in subsequent sections, solely by reference to the value of the estate, after making certain deductions, without reference to the persons to whom the property may pass, and in utter disregard of the amount of benefit taken by them, or any of them, and without reference to any conditions or exemptions imposed upon or granted to the successors by the particular policy of the state. Nowhere in the act is there any recognition of the distribution of the estate, whether by will or under intestate laws, and the amount of the tax is not made to depend upon how and to whom the estate is to be distributed.

The imposition of the tax is not postponed to the completion of administration, but on the contrary the time of its payment is fixed solely by reference to the time of death (section 204). Again its payment is required to be made by the personal representative (section 207), and if not paid, "the property of the decedent" is to be sold under decree of court for the satisfaction of the tax. (Section 208). By the same section, the intent is clearly expressed, that the "undistributed estate" shall bear the burden of the tax, "it being the purpose

and intent of this title that so far as practicable and unless otherwise directed by the will of the decedent, the tax shall be paid before its distribution." Thus it would seem that in one view the tax is imposed upon the "estate" of the decedent, "the interest that ceases on death" and not upon legatees or devisees. This view was taken by several state courts where the controversy arose as between legatees and residuary beneficiaries as to whether this tax fell upon the estate or upon the particular legatees or devisees.

Re. Hamlin, 226 N. Y. 407; 7 A. L. R. 701 and notes.

Plunkett vs. Old Colony Trust Co., 233 Mass. 471; 7 A. L. R. 696.

Knight's Estate, 261 Pa. St. 537.

Some courts have also decided that this tax being imposed upon the estate of the decedent, and being payable out of net estate, is no part of the estate at the time of its distribution, but is a charge or expense against the estate, before distribution.

Corbin vs. Townsend, 92 Conn. 501.

People vs. Pasefield, 284 Ill. 450.

State vs. Probate Court, 139 Minn. 210.

People vs. Northern Trust Co. 289 Ill. 475; 7 A. L. R. 709 and notes.

See Contra:

Estate of Week, 169 Wis. 316.

Re. Sherman, 166 N. Y. Sup. 19; (affirmed 222 N. Y. 540).

Looking then upon the mode of imposition and enforcement of the exaction here, as being one in total disregard of any transfer to the successors or legatees, but directly upon the "net estate" as defined by the Act, then manifestly it amounts to nothing else than a *direct* tax on property, and void for want of apportionment commanded by the constitution.

If, on the other hand, by giving some effect or meaning to the words "transfer," the exaction be viewed as one not upon the transfer to the *beneficial* successors, but upon the transitory or intermediate transfer from the decedent to the executor or administrator which takes place on death, then clearly the exaction would be objectionable as a tax upon the state itself, or upon its instrumentalities.

The transfer of the estate to the executor or administrator, if it can be regarded in any sense as such, is not a transfer to them of any beneficial interest, but a transfer solely in trust for the purposes of carrying out the regulations of the state in that behalf prescribed. "The legal effect of granting letters testamentary or administrative is to place the whole estate, real and personal, within the custody of the law and leave it there until the administration has been completed."

Yonley vs. Lavender, 21 Wall. 276.
Byers vs. McAuley, 149 U. S. 608.

In that view, the personal representative is nothing more nor less than an instrumentality of the

state for the purposes of carrying out its regulations.

Tilt vs. Kelsey, 207 U. S. 43, 55.

In fact this intermediate transfer to the personal representative, cannot be viewed otherwise than as a transfer required and commanded by the laws of the state in the exercise of its sovereign and exclusive power to regulate and control the descent and distribution of the estate, as shown by a variety of cases.

Tilt vs. Kelsey, 207 U. S. 43.
Wall vs. Bissell, 125 U. S. 382.
Byers vs. McAuley, 149 U. S. 608.

This transitory transfer, as the court will observe, of the "interest that ceases on death" is the very initial step in the administration of every estate, by the exercise of the state regulation, and upon which every subsequent preceding in the state regulation is founded. A tax upon such transfer cannot be regarded otherwise than as a tax upon the state agency or instrumentality provided by its sovereign will, and is obviously objectionable under our dual system of government.

Collector vs. Day, 11 Wall. 113.
Ambrosini vs. United States, 187 U. S. 1.
Veazie Bank vs. Fenno, 8 Wall. 533-541.
Flint vs. Stone Tracy Co., 220 U. S. 107, 155.

Moreover, to view the exaction as one attaching upon the transfer to the personal representative, is

to intercept the passage of property from the decedent to the beneficial successors, at a point where the power of state regulation is in the very act of operation, and would be as objectionable, and for the same reasons that a tax by a state upon property *in transit* from one state to another, is condemned as a burden upon interstate commerce. 12 Corpus Juris, 98.

In Brown vs. Illinois, 227 U. S. 504, the court said:

> "This argument proceeds upon a misconception of the ground upon which the power to tax articles actually moving in interstate transportation is denied to the states. That denial rests upon the supremacy of the Federal power to regulate interstate commerce. Its postulate is the necessary freedom of that commerce from the burden of such local exactions as are inconsistent with the control and protection of that power. The fact that such a burden is sought to be imposed by the state of the domicile of the owner, upon property moving in interstate commerce, creates no exception. That state enjoys no prerogative to make levy upon such property passing through it, because it may belong to its citizens. They, as well as others, are under the shelter of the commerce clause. The question is determined not by the residence of the owner, but by the nature and effect of the particular state action with respect to a subject which has come under the sway of a paramount authority."

Paraphrasing the principle thus expressed by the quotation above, we say that the ground on which

the denial of the power of congress to tax the transitory passage of property while it is in the custody of the state and upon which the state power is at the time being wielded, rests, is the supremacy of the state to regulate successions.

Its postulate is the *necessary freedom* of that regulation from the burden of such federal exactions as are inconsistent *with the control and protection of that power.* The question is determined not by the name of the exaction, but by the nature and effect of the particular federal action with respect to a subject which has come under the sway of a paramount authority.

If on the other hand we look upon the exaction as one not directly upon the net estate and not upon the transitory transfer to the executors, but as an exaction upon the *transfer of aggregate beneficial interests* which the state has undertaken to effect in the successors of the decedent, the imposition cannot escape the condemnation as one casting a burden upon state power when its operation and effect as enforced are given due weight.

It will be observed at the outset, that all death duties, imposed by the various states, are by the overwhelming weight of authority regarded as a tax in the nature of a bonus exacted by the state for the privilege granted by its laws of inheritance or succeeding to property on the death of the owners. They are generally regarded as being upon the interest to which persons succeed on a death, and not upon the interest that ceases by reason of

death; such taxes are commonly called "inheritance" or "succession" or "transfer" taxes.

(See collection of cases in note to Re. McKennan, 33 L. R. A. (N. S.) 606.)

It is undoubtedly true that the taxing power of Congress, extends to and may be exercised upon "the interest that some person succeeds at death," but the imposition of the exaction must be so provided for, that the state's power of regulation, *as a factor in the transmission or the receipt of property on death*, is *first* given full play, which is but another way of saying, that the power of congress to tax does not begin or attach until the state regulation upon the particular subject had ceased, or has been so far expended as to produce a definable or ascertainable subject, no longer under the sway of the paramount power.

It was upon the application of that principle that a tax on a legacy or receipt, was sustained in Knowlton vs. Moore and Scholey v. Rew, 23 Wall, 331, and there are no federal cases holding that a federal inheritance or succession tax ever attached or became a charge against any interest, *until by the process of state regulation and by its authority*, there emerged or was introduced a subject for the exercise of federal taxing power.

But here by the manner of the imposition of the tax, and its enforcement, it is manifestly impossible to give effect to or enforce the tax, without *at the same time*, to so far disregard the states power of regulation, *as a factor in the transmis-*

sion, as to interpose the federal exaction *as a factor or a condition* in such transmission.

By intercepting the consummation of the "transfer" in the beneficiaries, as this act does, before the transfer is completed and the respective rights of the successors are defined, *as by state law commanded*, the exertion of the federal power, as manifested in the act, becomes *an intermeddling or regulating factor, or a price or a condition* of the transmission.

Measuring the tax as it does here, solely by the *mass* of the estate in its process of transmission, without reference to its beneficial destination, and in utter disregard of the state's regulations, relating to its final distribution, it manifestly *prevents* the state from performing its operation, or carrying out its sovereign will, according to its own policy.

Pertinent are the remarks of Chief Justice Marshall in *Gibbons vs. Ogden*: "To regulate implies in its nature full power over the thing to be regulated; *it excludes necessarily the action of all others that would perform the same operation on the same thing.*"

But how can the action of the federal government be deemed to have been excluded in the state regulation, when by the very design of the act, the state is prevented from performing its operation, by the intermeddling of another power, which at the same time reaches over and withdraws from that operation, and appropriates to its purposes, the very object of that operation?

Certainly a tax imposed as this one is, measured by the mass of the estate diminishes not only to the extent of the tax, the "net estate," but also the separate shares of the successors. Bearing in mind this diminution of the net estate, as well as the separate shares which must result from the enforcement of the tax in its method of imposition, the following results are inevitable:

(a) A condition or price is imposed upon the successors which must be complied with before they may take their shares in the residue.

(b) There is withdrawn from the operation of the state's power a part of the thing (net estate) which the state by its laws has conceded to the successors, as well as a part of the same thing which the state has exacted or reserved for itself.

In either case, the power of the state is thus sensibly burdened and directly invaded; (a) by imposing a condition or a price before a successor may take his share in the residue, it denies to the state its paramount right to say what shall pass to such successor, to the extent of the imposition, and (b) by withdrawing from the state regulation the part of the thing which the state has exacted for itself, it denies to the state to the extent of the tax, its paramount right to determine for itself what part of the thing shall be exacted as a condition of the transfer.

Had the exaction been measured by the value of each specific distributive share, and enforced after each such share was ascertained, or made ascertain-

able by means of state regulation, it is obvious that no burden upon or invasion of state power could then be conceived, but by the very design of the act, this is made impossible, since the measurement of the tax and the method of its imposition and enforcement, expressly forbid the taking into account of the *separate* value of each distributive share, but on the contrary the command of the act, is to measure and enforce the tax by the value of the *mass* of the estate, regardless of its destination.

A few examples by way of illustration of the operation and effect of the exaction upon the state's power of regulation may be appropriate here. Thus, looking at the table for computing the estate tax prepared by the Commissioner, (Article 8, Regulations No. 37), insofar as it applies to the act of September 8th, 1916, the following appears: Upon an estate of \$250,000 the tax amounts to \$5,500.00; upon an estate of \$1,000,000.00 the tax is \$41,000.00; upon an estate of \$5,000,000.00 the tax is \$341,000.00; and upon an estate of \$10,000,000.00 the tax is \$841,000.00. These sums comprising the taxes are obviously parts of such several estates before their distribution in accordance with the state regulations. Obviously the withdrawal of those sums from the estate prevents the states from exercising their power of regulation thereon. In other words, the sums mentioned, representing the estate tax, and ranging from \$5,500.00 to \$841,000.00 never come within the sway of the state's power. It must follow, there-

fore, that to the extent of the imposition, the federal power becomes a factor or a condition in the transmission, and to that extent invades and directly burdens the exclusive power of state regulation, by denying to the state, to the extent of the imposition, its paramount right to say what shall pass to the successor, as well as by denying to the state, to the same extent, its paramount right to determine for itself what part of the estate shall be exacted for itself as a condition of the transfer or succession.

Had the act in question in express words provided—"that to the extent of the tax hereby imposed, no state shall permit the succession to property of any decedent dying after the passage of this act"—would any one then pretend that the power of states' regulation was not directly burdened or embarrassed in its operation, to the extent of such express prohibition? Would it not then be obvious that Congress had imposed a condition upon the laws of descent of every state as well as a condition upon each state's paramount right of regulation of succession or descent of property? Would anyone then pretend that such law was a valid exercise of taxing power of Congress? Why not? Obviously, because the power of regulation of successions is not within the province of the national government, but is vested exclusively in the states.

It is beyond doubt that the taxing power knows no limitations upon its exercise, when within its lawful sphere, save only the will or discretion of the legislative body, and so, here, if Congress may thus

impose its taxation upon the occasion of death, it may do so to any extent. If the power so to do be conceded, is it not manifest that by an increase of the rates to, say, fifty per cent, or one hundred per cent of the value of net estates, that the enactment must operate to inhibit to the states to the same extent and the same thing, the operation of their laws respecting devolution of property on death? Is it not apparent from mere statement, that an interdiction of the states power in such manner must be as effectual as if expressly worded as above? It is too obvious to require discussion, that whatever is withdrawn by Congress from the operation of the states power and before that power can be expended, may not come within the operation of that power.

Hence, if the mode of its imposition, operation and enforcement be given, as it must be, due weight, the exaction here operates precisely in the same way and produces the same result which would have been accomplished, had the act in question in express words contained the prohibition to the states in the words above quoted. Thus is revealed the illegality of the exaction. *In substance* the exaction is not only a tax upon transfer of property effected by death, but by its operation and effect, by withdrawal of part of the estate from state regulation it necessarily operates as a regulation of descent of property and thereby casts a direct burden upon the states' paramount power of such regulation.

The act in question presents the problem whether it and the states laws taken with respect to the regulation of the transmission of property on death, may, concurrently, have operation upon the same subject without resulting conflict.

The solution of the question requires that in considering the nature and intended operation of the Act of Congress, that due consideration be also given to the operation of such state laws, and the power given expression by them, relating to the subject with which the Act deals; and so, when it is admitted that those laws are the exercise of a paramount authority respecting the subject in hand committed exclusively to the states, and that the operation of those laws may not be interfered with by Congress, the question resolves itself into one whether the Act of Congress may have operation.

The states may not be trammelled in the exercise of their power. Thus full operation must be accorded the states laws. How then may the Act of Congress have force and effect? If its operation is to embarrass or burden the states power then it must be promptly conceded that it may not be given effect. Statutes must be interpreted, if possible, so as to make them consistent with the Constitution and the paramount law. *Presser vs. Illinois*, 116 U. S. 252.

Now, were it to be argued, that there must be ascribed to "the transfer of the net estate" the significance or meaning of *the transfer which the*

states effect in successors, it must appear from the demonstration that has been made, that, if such be the conception of what is the subject of taxation, the states are never permitted to effect transmission or the transfer to successors of that portion of of estates comprising the Federal exaction. The tax is measured by the mass of what is defined by the Act to be "net estate" and is deducted from that mass, and provision is made by the Act, Sec. 207, for the issuance by the collector of a receipt evidencing payment which "shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts." It is to be observed that what the states prescribe shall be taken by persons designated as successors, is the residue only of estates of decedents shown by the account of administration upon allowance and settlement. So that, the deduction of this tax before or at the point of the definition of what shall pass to successors clearly diminishes that which the states may pass to successors. In other words, the operation and effect of the tax, through the mode of measurement and the deduction or withdrawal of the amount from estates before the shares to pass to successors can be measured, defined or ascertained, and the deduction or withdrawal of which sensibly lessens the shares which the states may pass to successors, militates against such being the subject of taxation. Such a construction immediately exposes the tax as a condition exacted by

Congress of the states or of the successors which must be performed before the states may define or pass, or the successors may receive, the residue. The difficulty is found in the plain wording of the enactment, which by the mode of imposition and enforcement denies the conception that such is the subject of taxation. As already noticed, there is no word of recognition in the Act of persons standing as successors; nor of the relation or want of relation of successors to a decedent; nor of reference to the distribution of the estate; nor of state laws regulating the transmission and succession to property; but on the contrary the net estate as defined in the Act is seized upon as the unit of taxation and the tax thereon is graduated in accordance with its value, without regard to the provisions of state laws determining the manner property on death shall be split and divided between persons designated as successors.

This court in *Henderson v. Wickham, Mayor*, 92 U. S. 259, speaking in reference to the Act of several states requiring shipmasters to give a bond for each passenger landed by them, in the penal sum of $300 to indemnify the states against expense for relief or support of the passenger named, or alternatively to pay $1.50 for each passenger landed, held the Acts to be invalid regulations of commerce, and said:

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is ap-

parent that the object of this statute as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore * * * it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers * * * as was the statute held void in the *Passenger Cases.* (7 How. 283.) * * * *The effective operation of this law commences at the other end of the voyage.* The master requires of the passenger, before he is admitted on board, as a part of the passage money, the sum which he knows he must pay for the privilege of landing him in New York. It is, as we have already said, in effect, a tax on the passenger, which he pays for the right to make the voyage—a voyage only completed when he lands on the American shore" * * *

So here whatever be considered the subject of taxation, *the effective operation of this law commences at the beginning of the voyage*, and requires toll from all that which is to pass, before the states, giving direction to the voyage, may determine what shall pass to a certain destination.

Paraphrasing what was said in *Western Union vs. Kansas, supra*, (216 U. S. on page 30), we say: Looking then at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the exaction here, is in its essence not simply a tax upon a transmission or receipt of property occasioned by death, but a form of regulation of successions as well, and therefore

a burden upon and an usurpation of the states paramount power of regulation. In other words, the subject of taxation, as actually revealed by the operation and effect of the Act, is in fact broader than the boundaries of the taxing power of Congress, and therefore cannot be regarded as a legitimate subject of taxation.

As in the *Western Union v. Kansas* case, the court, while yielding to the state its unlimited power to impose a tax upon a foreign corporation as a condition of its right to do local business in Kansas, declared the tax invalid because by its measurement and imposition, it was *based* upon something more than the business of the corporation solely within the state and thereby burdened interstate commerce; so here, while acknowledging to Congress its power to tax legitimate subjects of taxation, the exaction by the mode of its imposition, measurement and enforcement, is obviously *based* upon, and includes within it, something more than the mere transmission of property occasioned by death; to-wit: the exaction, in fact, overreaches the boundaries of that subject of taxation and by its own force and *at the same time*, operates as a regulation of descent—a subject within the sway of another paramount power and therefore prohibited to Congress.

The power to tax is the power to destroy, *McCulloch v. Maryland*, 4 Wheat. 316, which principle is pertinent only where there is no power to tax; *Knowlton v. Moore, supra*.

7. ANY CONSTRUCTION OF THE ACT WHICH WOULD PERMIT THE STATE TO DEDUCT ITS TAX BEFORE COMPUTATION OF THE ESTATE TAX, CANNOT AFFECT OR MILITATE AGAINST THE CONTENTION THAT THE STATES' POWER OF REGULATION OR ITS LAWS OF SUCCESSION, ARE BURDENED OR IMPAIRED TO THE EXTENT OF THE EXACTION.

If it be once conceded, as we think it must be, that by its operation, enforcement and effect, the exaction here withdraws to the extent of the tax, a part of the estate upon which the power of the state is being at the time wielded, and thereby excludes its operation to that extent, it is obvious that any construction of the Act which would merely permit the state to deduct its tax before the computation of the Estate Tax can in no way impair or militate against the soundness of the contention that even then the state's power is nevertheless burdened and denied to the extent of the exaction.

To demonstrate the soundness of this proposition, requires merely recalling to the attention of the court, the force of two considerations which bear upon this question: (a) as universally considered by the vast majority of state courts, and also by this court, the so-called "inheritance", "succession" or "transfer" taxes exacted by the states, are in reality a *bonus* or price which the state has a right to and does exact, as a condition or consideration for such inheritance, succession or transfer.

This bonus or price is exacted for the performance by the state of certain result, viz: effectuating the succession or the transfer in conformity to its laws of regulation of successions. (b) "Regulation when adopted is designed for the entire result, and the production of a uniform whole" (*Gibbons v. Ogden.*)

Bearing in mind these considerations, the validity of which cannot be disputed, the question is: how can the state produce the certain result, by the mere receipt of the consideration for it, when it is shown as here, that the performance of the very result, for which the consideration is exacted, is interrupted and burdened by the intervention of another power coming in and withdrawing from the operation of such performance, a part of the same thing upon which the state had undertaken to perform that certain result?

It is true that by such deduction, the state's exaction is satisfied, but has the state performed the result for which it exacted the bonus? Certainly not. Manifestly the result which it undertook to perform is nevertheless diminished to the extent of the federal exaction, and to that extent the law of the State has been nullified or denied.

8. THE QUESTION OF POWER IS NOT TO BE DETERMINED BY THE AMOUNT OF THE BURDEN ATTEMPTED TO BE CAST.

Were it to be contended that the Act complained of cannot be considered as casting a burden upon the states' power in a relatively immediate way, because in many or most cases the tax must be comparatively small or insignificant, the sufficient answer must be that the extent of an injury never measures the rightfulness of the act producing it. Indeed, it can hardly be claimed that a tax which withdraws from the operation of the states' power, or burdens that power in its exercise, to the extent noted in the foregoing illustrations (and materially greater under the Revenue Act of 1918 by increased rates reaching *one-quarter* of all estates in excess of $10,000,000) is or can be other than substantial, immediate and direct.

This court having occasion to consider the question of the compulsory production of the books and papers of persons charged with violation of the revenue laws of the United States, as an unwarranted search and seizure within the meaning of the Fourth Amendment, said in *Boyd v. United States*, 116 U. S. 616.

> "Though the proceeding in question is divested of many of the aggrevating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest

and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sounds than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

Again in *Fairbank v. United States,* 181 U. S. 283, which reviewed a conviction for issuing an export bill of lading without affixing thereto an internal revenue stamp of ten cents required by the Act of June 13, 1898, the constitutionality of which Act was assailed as in violation of the provision that no tax or duty shall be laid on any articles exported from any state, this court speaking in reference to the small amount of the tax, said:

"* * * The question of power is not to be determined by the amount of the burden attempted to be cast. The constitutional language is, 'no tax or duty.' A 10-cent tax or duty is in conflict with that provision as certainly as a 100-dollar tax or duty. Constitutional mandates are imperative. The question is never one of amount, but one of power. The applicable maxim is, '*obsta principiis*', not '*De minimis non curat lex.*' "

* * * * *

For the reasons which have been advanced, the State of Minnesota deems that Title II, Estate Tax, of the Act of Congress, September 8th, 1916, entitled "An Act to increase the revenue, and for other purposes," is an encroachment upon and interference with its exclusive power to regulate the transmission of property on death, and impedes, embarrasses and burdens the exercise of that power, and in consequence that the tax laid is in violation of its sovereign rights, and the Constitution of the United States.

Respectfully submitted,

CLIFFORD L. HILTON,
Attorney General.
EGBERT S. OAKLEY,
Assistant Attorney General.
For Minnesota.

APPENDIX.

Provisions of the Estate Tax Act of 1916.

Estate Tax Law of 1916 (Revenue Act of 1916, Title II).

Sec. 200. That when used in this title—

The term "person" includes partnerships, corporations, and associations;

The term "United States" means only the States, the Territories of Alaska and Hawaii, and the District of Columbia;

The term "executor" means the executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession of any property of the decedent; and

The term "collector" means the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death, or, if there was no such domicile in the United States, then the collector of the district in which is situated the part of the gross estate of the decedent in the United States, or, if such part of the gross estate is situated in more than one district, then the collector of internal revenue at Baltimore, Maryland.

Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

One per centum of the amount of such net estate not in excess of $50,000;

Two per centum of the amount by which such net estate exceeds $50,000 and does not exceed $150,000;

Three per centum of the amount by which such net estate exceeds $150,000 and does not exceed $250,000;

Four per centum of the amount by which such net estate exceeds $250,000 and does not exceed $450,000;

Five per centum of the amount by which such net estate exceeds $450,000 and does not exceed $1,000,000;

Six per centum of the amount by which such net estate exceeds $1,000,000 and does not exceed $2,000,000.

Seven per centum of the amount by which such net estate exceeds $2,000,000 and does not exceed $3,000,000;

Eight per centum of the amount by which such net estate exceeds $3,000,000 and does not exceed $4,000,000;

Nine per centum of the amount by which such net estate exceeds $4,000,000 and does not exceed $5,000,000; and

Ten per centum of the amount by which such net estate exceeds $5,000,000.

Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, whatever situated:

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; and

(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.

For the purpose of this title stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (b) of this section, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.

Sec. 203. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate, arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are al-

lowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

(2) An exemption of $50,000;

(b) In the case of a nonresident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States that proportion of the deductions specified in paragraph (1) of subdivision (a) of this section which the value of such part bears to the value of his entire gross estate, wherever situated. But no deductions shall be allowed in the case of a nonresident unless the executor includes in the return required to be filed under section two hundred and five the value at the time of his death of that part of the gross estate of the nonresident not situated in the United States.

Sec. 204. That the tax shall be due one year after the decedent's death. If the tax is paid before it is due a discount at the rate of five per centum per annum, calculated from the time payment is made to the date when the tax is due, shall be deducted. If the tax is not paid within ninety days after it is due interest at the rate of ten per centum per annum from the time of the decedent's death shall be added as part of the tax, unless because of claims against the estate, necessary litigation, or other unavoidable delay the collector finds that the tax cannot be determined, in which case the interest shall be at the rate of six per centum per annum from the time of the decedent's death until the

cause of such delay is removed, and thereafter at the rate of ten per centum per annum. Litigation to defeat the payment of the tax shall not be deemed necessary litigation.

Sec. 205. That the executor, within thirty days after qualifying as such, or after coming into possession of any property of the decedent, whichever event first occurs, shall give written notice to the collector. The executor shall also, at such times and in such manner as may be required by the regulations made under this title, file with the collector a return under oath in duplicate, setting forth (a) the value of the gross estate of the decedent at the time of his death, or, in case of a non-resident, of that part of his gross estate situated in the United States; (b) the deductions allowed under section two hundred and three (c) the value of the net estate of the decedent as defined in section two hundred and three; and (d) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

Return shall be made in all cases of estates subject to the tax or where the gross estate at the death of the decedent exceeds $60,000, and in the case of the estate of every nonresident any part of whose gross estate is situated in the United States. If the executor is unable to make a complete return as to any part of the gross estate of the decedent, he shall include in his return a description of such

part and the name of every person holding a legal or beneficial interest therein, and upon notice from the collector such person shall in like manner make a return as to such part of the gross estate. The Commissioner of Internal Revenue shall make all assessments of the tax under the authority of existing administrative special and general provisions of law relating to the assessment and collection of taxes.

Sec. 206. That if no administration is granted upon the estate of a decedent, or if no return is filed as provided in section two hundred and five, or if a return contains a false or incorrect statement of a material fact, the collector or deputy collector shall make a return and the Commissioner of Internal Revenue shall asess the tax thereon.

Sec. 207. That the executor shall pay the tax to the collector or deputy collector. If for any reason the amount of the tax cannot be determined, the payment of a sum of money sufficient, in the opinion of the collector, to discharge the tax shall be deemed payment in full of the tax, except as in this section otherwise provided. If the amount so paid exceeds the amount of the tax as finally determined, the Commissioner of Internal Revenue shall refund such excess to the executor. If the amount of the tax as finally determined exceeds the amount so paid the commissioner shall notify the executor of the amount of such excess. From the time of such notification to the time of the final payment

of such excess part of the tax, interest shall be added thereto at the rate of ten per centum per annum, and the amount of such excess shall be a lien upon the entire gross estate, except such part thereof as may have been sold to a bona fide purchaser for a fair consideration in money or money's worth.

The collector shall grant to the person paying the tax duplicate receipts, either of which shall be sufficient evidence of such payment, and shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts.

Sec. 208. That if the tax herein imposed is not paid within sixty days after it is due, the collector shall, unless there is reasonable cause for further delay, commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still

undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

Sec. 209. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

If the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) and if the tax in respect thereto is not paid when due, the transferee or trustee shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, shall be subject to a lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in

money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

Sec. 210. That whoever knowingly makes any false statement in any notice or return required to be filed by this title shall be liable to a penalty of not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Whoever fails to comply with any duty imposed upon him by section two hundred and five, or having in his possession or control any record, file, or paper, containing or supposed to contain any information concerning the estate of the decedent, fails to exhibit the same upon request to the Commissioner of Internal Revenue or any collector or law officer of the United States, or his duty authorized deputy or agent, who desires to examine the same in the performance of his duties under this title, shall be liable to a penalty of not exceeding $500, to be recovered, with costs of suit, in a civil action in the name of the United States.

Sec. 211. That all administrative, special and general provisions of law, including the laws in relation to the assessment and collection of taxes, not heretofore specifically repealed are hereby made to apply to this title so far as applicable and not inconsistent with its provisions.

Sec. 212. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make such regulations, and prescribe and require the use of such books and forms, as he may deem necessary to carry out the provisions of this title.

Supreme Court of the United States

OCTOBER TERM, 1920

No. 286

NEW YORK TRUST COMPANY AND ALBERT W. PROSS

AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF J. HARSEN PURDY, *DECEASED*

PLAINTIFFS IN ERROR

v.

MARK EISNER

COLLECTOR

DEFENDANT IN ERROR

BRIEF ON BEHALF OF THE COMMONWEALTH OF MASSACHUSETTS, SUBMITTED BY ITS ATTORNEY-GENERAL AS AMICUS CURIAE

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STATEMENT.

In the above entitled case, the constitutionality of the Federal estate tax, imposed by the Revenue Act of 1916 (39 Statute, 777) has been attacked upon the following grounds, among others: — that the tax is an usurpation of the sovereign power of states to regulate descent and distribution, and that it is a direct tax and invalid because not apportioned.

The Commonwealth of Massachusetts has three reasons for being interested in the question of the constitutionality of the act, these being:

First. — That the tax being measured by the whole estate and taken out before distribution, burdens and impairs its sovereign right to regulate descent and distribution;

Second. — That the exaction is in such form that it reduces the revenues of the state as it is taken out before computing the toll which the state exacts in the exercise of its power to regulate descent and distribution;

Third. — That it represents the citizens of the Commonwealth, who are damaged in that they are unconstitutionally required to pay a larger proportion of the total amount raised by the Federal Government from this death duty than they would be required to pay if it were constitutionally apportioned, as it is a direct tax and should be apportioned among the states upon the basis of population.

ARGUMENT.

First.

The Federal Estate Tax cannot be sustained upon the Grounds on which the Succession Taxes were sustained in Knowlton v. *Moore, 178 U. S. 41, and Scholey* v. *Rew, 23 Wall. 331.*

The taxes considered in those cases were succession taxes imposed on the exercise of the right of legatees or distributees to receive a share of a decedent's estate.

The Federal estate tax imposed by the Revenue Act of 1916 is a tax upon the property owned by the

decedent at the time of his death. This distinction is recognized in numerous cases.

Corbin *v.* Townshend, 92 Conn. 501.
Knight's Estate, 261 Pa. St. 537.
People *v.* Pasfield, 284 Ill. 450.
State *v.* Probate Court, 139 Minn. 210.
People *v.* Bemis (Colo.), 189 Pac. 32.
State *v.* First Calumet etc. Co. (Ind.) 125 N. E. 200.
Northern Trust Co. *v.* Lederer, 257 Fed. 812 (affirmed in Lederer *v.* Northern Trust Co. 262 Fed. 52).

In a recent California case, Estate of Henry Miller, decided January 18, 1921, the Court distinguishes the two kinds of tax thus:

"The federal tax under the act of 1916, on the other hand, is not a succession tax, but an estate tax, not a tax on what comes to the beneficiaries or heirs, but upon what is left by the decedent. In this respect it differs from the legacy tax imposed by the United States War Revenue Act of 1898. The Act of 1916 entitled the tax an 'estate tax' and in terms imposes it upon the net estate of the decedent as a unit. It is not apportioned among the various transferees and bears no relation to the separate amounts which they are to receive. The distinction between a succession tax and an estate tax is a recognized distinction, and, so far as we are aware, it has been held without exception that the federal tax, under the act of 1916, is of the latter character. It is not possible, in our judgment, to take any other reasonable view of it.

"The nature of the federal tax is discussed in *In re Roebling's Estate*, 89 N. J. E. 163, and it is said (p. 166): 'To be more precise, it is imposed upon the *estate*, transferred by death, and

not upon the *succession* resulting from death. The distinction is well defined and recognized in countries where both kinds of tax exist. The federal tax resembles the probate duty of the act of 1862, chapter 119 (12 U. S. Stats., p. 483), which was payable by the executor out of the estate, while the legacy duty therein provided for was payable by the beneficiaries. The tax occupies the same field of death duty as does the 'Estate Tax' in England. By the Finance Act of 1894 an estate duty is levied upon the principal value of all property, real or personal, which passes on the death of a person and is imposed upon the estate and is payable by the executor as an administration expense. In addition to this tax, there is also a legacy tax, and a succession duty upon the realty, payable by the recipients. Speaking of the death duty, Mr. Hanson in his opening chapter — Hans. D.D. (6th ed.), says:

"'The new duty imposed by the Finance act, 1894, and called estate duty, supersedes probate duty; but the key to the construction of the Finance act, 1894, and the amending act lies in remembering that the new estate duty, although it is leviable on property which was left untouched by probate duty, such as real estate, yet is in substance of the same nature as the old probate duty. What it taxes is not the interest to which some person succeeds on a death, but the property in respect of which an interest ceased by reason of the death. Unless this principle is clearly kept in view, the mind is constantly tempted by the wording of the act to revert to principles of succession duty, which have no real connection with the subject.'"

The nature and effect of the Federal Estate tax was considered at length in the case of Woodward *et al.*, Executors, *v.* United States, decided by the Court of Claims of the U. S., March 14, 1921.

The Court, after discussing the provisions of the Federal Estate Tax Law of 1916, says:

"The various provisions thus recited seem to clearly indicate that the tax is a charge upon the estate. The statute calls it an 'estate tax'. In Knowlton *v.* Moore, 178 U. S. 41, 65, the use of the heading 'legacies and distributive shares of personal property' in the act was taken as indicative of what was in fact taxed. Here it is 'estate'. There the tax was upon the passing of legacies or distributive shares. The tax under consideration is imposed upon the transfer of the net estate. In Knowlton *v.* Moore, the statute under consideration was the act of 1898, and it was declared to mean either that the tax was imposed on the passing of the whole amount of the personal estate, or on the passing of legacies or distributive shares of personalty, determined either by the separate sum of each legacy or distributive share or by the volume of the whole personal estate. The court, speaking through Mr. Justice (now Chief Justice) White, says (p. 65): 'The statute clearly imposes the duty on the particular legacies or distributive shares, and not on the whole personal estate. It does not say that the tax is levied on the personal estate left by the deceased person, but it is imposed on legacies or distributive shares arising from such property'.

"It must be recognized that the Congress, in considering the act of 1916, was familiar with the act of 1898, and the construction of it by the Supreme Court in Knowlton *v.* Moore. Indeed by reference to the report of the Committee on Ways and Means (Report No. 922, 64th Cong., 1st sess.), having the bill in charge, it appears that the distinction between an estate tax upon the transfer of the estate and a tax upon the shares passing to distributees or legatees was had in view by the committee. It was said 'Your committee deemed it advisable to recommend a Federal estate tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees.' See upon this point In re Hamlin, 226 N. Y. 407, where the court considers the proceedings in Congress upon the passage of the bill."

The Court then calls attention to various State and Federal cases in which the Federal estate tax is distinguished from the succession tax, and concludes as follows:

"It thus appears from the terms of the statute itself and its declared purpose that the estate tax is a tax which is levied upon, and payable out of, the estate in the hands of the executors, and that the authorities in some instances hold it to be a charge of administration, while all of them hold it to be payable out of the estate."

In Hanson's Death Duties (6th ed., pages 1 and 2) the author in referring to the English estate duty levied "upon the principal value . . . of all property . . . which passes on the death" of persons, says, in distinguishing the estate tax from the succession tax:

"The new duty[1] imposed by the Finance Act, 1894, and called Estate duty, as has been said above, supersedes probate duty; but the key to the construction of the Finance Act, 1894, and the Amending Acts lies in remembering that the new Estate duty *although it is leviable on property* which was left untouched by probate duty, such as real estate, yet is in substance of the same nature as the old probate duty. *What it taxes is not the interest to which some person succeeds* on a death, but the property in respect of which an interest ceased by reason of death. Unless this principle is clearly kept in view, the mind is constantly tempted by the wording of the Act to revert to principles of succession duty which have no real connection with the subject."

"It is leviable in respect of the property, both real and personal, which passes or is deemed to have passed on the death of the deceased." Hanson's Death Duties, page 2.

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[1] Finance Act, 1894 (57 and 58 Vict. c. 30).

This Court, in Knowlton *v.* Moore, 178 U. S. 41, 48, 77, referring to this distinction made in Hanson's treatise, said:

"Indeed, the confusion which gives rise to both of the constructions of the statute which we have just considered, comes from the want of insight pointed out by Hanson in a passage which we have heretofore quoted; that is, it arises from not keeping in mind the distinction between a tax on the interest to which some person succeeds and a tax on the interest which ceased by reason of the death, *the two being different objects of taxation.*"

It is not to be supposed, however, that this Court, in recognizing this distinction, intended to say that Congress could levy a valid estate tax. In considering such question, it is obvious that the validity of an estate duty in England is wholly independent of constitutional restrictions, whereas in the United States such a tax must meet the requirements of the Federal Constitution, — and the question whether it is a direct tax or an indirect tax, and the question whether it is in its essence an encroachment upon the exclusive powers of states to regulate the devolution of property, become of vital importance.

Second.

The Federal Estate Tax is an Encroachment upon the Exclusive Power of the Several States to regulate the Descent and Distribution of Property of Decedents Domiciled therein, and is, for that Reason, Unconstitutional and Void.

I. The several States possess the exclusive power to regulate and control the descent and distribution of property.

In Mager *v.* Grima, 8 Howard 493, 490, this Court sustained the constitutionality of a tax imposed by the State of Louisiana upon a legacy payable to an alien. The Court (Taney, C.J.) said, concerning the power of the state to regulate the descent of property:

"Now, the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. Every State or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. In many of the States of this Union at this day, real property devised to an alien is liable to escheat. And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. The right to take is given to the alien, subject to a deduction of ten per cent. for the use of the State.

"In some of the States, laws have been passed at different times imposing a tax similar to the one now in question, upon its own citizens as well as foreigners; and the constitutionality of these laws has never been questioned. And if a State may impose it upon its own citizens, it will hardly be contended that aliens are entitled to exemption; and that their property in our own country is not liable to the same burdens that may lawfully be imposed upon that of our own citizens."

In United States *v.* Fox, 94 U. S. 315, this Court, in affirming a decree of the Court of Appeals of New York holding that a devise to the United States of land in New York was void because not permitted by laws of the State of New York, said:

"The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. McCormick *v.* Sullivant, 10 Wheat. 202. *The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government.* The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the State."

In Tilt *v.* Kelsey, 207 U. S. 43, 55, this Court, in considering the extent of the power of the several states in the matter of succession to property on death, said:

"When the owners of property die, that property, under the conditions and restrictions of the law applicable, is transmitted to their successors named by their wills or by the laws regulating inheritance in cases of intestacy. For a suitable time it is essential that the property should remain under the control of the State, until all just charges against it can be discovered and paid, and those entitled to it as new owners can be ascertained. It is in the public interest that the property should come under the control of the new owners, after such delays only as will afford opportunity for investigation and hearing to guard against mistake, injustice, or fraud. It is the duty of the sovereign to provide a tribunal, under whose direction the just demands against the estate may be determined and paid, the succession decreed, and the estate devolved to those who are found to be entitled to it. Sometimes this duty is performed by conferring jurisdiction upon a single court and sometimes by dividing the jurisdiction among two or three courts. The courts may be termed ecclesiastical, probate, orphans', surrogate or equity courts. The jurisdiction may be exercised exclusively in one, or divided among two or more, as the sovereign may determine. *But somewhere the power must exist to decide finally as against the world all questions which arise in the settlement of the succession.* Mistakes may occur and sometimes do occur, but it is better that they should be endured than that, in a vain search for infallibility, questions shall remain open indefinitely. As was said by Mr. Justice Bradley, speaking on this subject in *Broderick's Will*, 21 Wall. 503, p. 519: 'The world must move on, and those who claim an interest in persons and things must be charged with knowledge of their status and condition, and of the vicissitudes to

which they are subject. This is the foundation of all judicial proceedings *in rem'*. It is therefore within the power of the sovereign to give to its courts the authority, while settling the succession of estates in their possession through their officers, the executors or administrators, to determine finally as against the world all questions which arise therein."

"*In respect to the settlement of the successions to property on death the States of the Union are sovereign and may give to their judicial proceedings such conclusive effect, subject to the requirements of due process of law and to any other constitutional limitation which may be applicable.*"

This Court has repeatedly asserted the principle that the United States may not interfere with the exercise by the sovereign states of those powers reserved to the states.

"Yet every State has a sphere of action where the authority of the National government may not intrude. Within that domain the State is as if the Union were not. Such are the checks and balances in our complicated but wise system of State and National polity." Farrington *v.* Tennessee, 95 U. S. 679, 685.

"The people of the United States resident within any State are subject to two governments; one State, and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad." United States *v.* Cruikshank, 92 U. S. 542, 550.

"It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State

governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States . . .

"The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved', are as independent of the general government as that government within its sphere is independent of the States." Collector *v.* Day, 11 Wall. 113, 124.

II. The Federal Estate Tax imposed by the Act of September 8, 1916, is in its operation and effect an invasion of the sovereign power of the States to regulate the descent and distribution of property of decedents.

In the consideration of this question, a helpful analogy is found in the cases affecting the Federal control of interstate and foreign commerce. These cases clearly establish the principle that any state tax affecting interstate or foreign commerce is such an invasion of the exclusive federal power to regulate as to invalidate the tax.

When the State of Kansas undertook to impose a tax on a foreign corporation engaged in interstate commerce, this Court said:

"A State may not exert its concededly lawful powers in such a manner as to impose a direct burden on interstate commerce. This is so elementary as to require no reference to the multitude of authorities by which it is sustained." Pullman Co. *v.* Kansas, 216 U. S. 56, 65.

"And all restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States." Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 214.

In Philadelphia & Southern Steamship Co. *v.* Pennsylvania, 122 U. S. 326, in holding invalid a tax on the gross receipts of a steamship company engaged in interstate and foreign commerce, the Court said:

" . . . it cannot be pretended that the State could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms." 122 U. S. 336.

In Brown *v.* Maryland, 12 Wheat. 419, this Court held a tax on the sales of an importer was a tax on the import, and in Cook *v.* Pennsylvania, 97 U. S. 566, held that a tax on auctioneers' sales of imported goods in original packages, was a tax on imports, and both were invalid, as the State taxed subjects of taxation within the exclusive power of Congress.

The validity of a statute is to be determined by its effect and operation.

"According to the well-settled rules of statutory construction, the validity of a statute, whatever its language, must be determined by its effect or operation, as manifested by the natural and reasonable meaning of the words employed. Henderson *v.* Mayor of New York, 92 U. S. 259, 268. If a statute by its necessary operation, really and substantially burdens the interstate business of a foreign corporation seeking to do business in a State, or imposes a tax on its property outside of such State, then it is unconstitutional and void, although

the State legislature may not have intended to enact an invalid statute." Ludwig *v.* Western Union Telegraph Co. 216 U. S. 146, 162.

If the necessary operation and effect of a tax is to burden interstate commerce, the validity of the tax is not saved because the state expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce. Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, 27.

It is submitted that the practical operation and effect of the Federal estate tax interferes with the State's power of control over decedent's estates. This exclusive power of the State begins at the instant of the decedent's death and continues until the time for distribution of the estate arrives.

In Carpenter *v.* Pennsylvania, 17 How. 456, this Court said:

> "But, until the period for distribution arrives, the law of the decedent's domicile attaches to the property, and all other jurisdictions refer to the place of the domicile as that where the distribution should be made. . . . The rights of the donee are subordinate to the conditions, formalities and administrative control, prescribed by the State in the interests of its public order, and are only irrevocably established upon its abdication of this control at the period of distribution."

The passage just quoted was referred to with approval in Orr *v.* Gilman, 183 U. S. 278, 285.

The power and purpose of the State's control extends to the determination of the rights of creditors of the decedent, the vesting of the decedent's property in accordance with the laws of the State governing descent

and distribution, and to the exaction of whatever price or toll the state may see fit to impose as the condition of the exercise by it of its control and administration of the decedent's estate.

"The law takes every decedent's estate into custody, and administers it for the benefit of creditors, legatees, devisees and heirs, and delivers the residue that remains, after discharging all obligations, to the distributees entitled to receive it. . . . And it is not until this work of administration is performed, that the right of succession attaches." Strode *v.* Commonwealth, 52 Pa. St. 181, 189.

The provisions of the Federal estate tax law of September 8, 1916, assume a large measure of control over the estates of decedents.

Section 200 of the Act defines "executor" as follows:

"The term 'executor' means the executor or administrator of the decedent, or if there is no executor or administrator, any person who takes possession of any property of the decedent."

Section 205 imposes on the executor so defined, the obligation within thirty days after qualifying as such executor, or after coming into possession of any property of the decedent, whichever event first occurs, to give written notice thereof to the Collector. The executor is also required at such times and in such manner as may be called for by regulations to furnish detailed information as to the estate.

Section 204 provides that the tax shall be due one year from the decedent's death, and if the tax is not paid within ninety days after it is due, interest shall be added to the tax at the rate of ten per cent from the time of the decedent's death.

Section 208 authorizes proceedings in the United States Court to enable the United States to subject the property of the decedent to be sold under judgment or decree of the Court, and authorizes the tax to be paid out of the proceedings of such sale.

Section 209 provides that the tax, unless sooner paid, shall be a lien for ten years upon the gross estate of the decedent, except such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration.

No provision in the act contains the suggestion that this Federal power of control is subordinate in any respect to that of the State. On the contrary, the Act of September 8, 1916, obviously contemplates a paramount control of Congress as to the matters therein provided.

The Bureau of Internal Revenue in certain cases assumed a certain amount of control over those in possession of the property before the State's own officers have been appointed to take possession of the same. The Act recognizes in a measure executors who have been appointed by the State's Probate Court, but it subjects them to its own rules and regulations and penalties for violation of such regulations, and provides that the Collector's receipt for the payment of the tax "shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts", thus imposing an obligation upon the Probate Courts of States which both in form and in substance is unquestionably an interference with the State's own control.

The Federal estate tax obviously becomes a prior lien upon the assets of a decedent, paramount to that

of the State. In this respect, it impairs the control of the State and imposes a burden upon the State: — in the first place, to the extent of the Federal tax, the very subject matter of the State's control is diminished, and in theory at least, might be wholly destroyed; in the second place, by diminishing the amount of the estate which comes within the control of the State, it prevents *pro tanto* the collection by the State of the amount of the price or toll which the State is entitled to exact as a condition precedent to the right of the distributees to receive their respective shares of the estate.

A few illustrations of the necessary effect and operation of the law will demonstrate the extent of the interference authorized by the Act of September 8, 1916.

Example I. — Assume an intestate decedent with no surviving wife or kindred; his property escheats to the State. The Federal estate tax is in terms "imposed on the transfer of the net estate of *every person*", and the Commissioner of Internal Revenue has ruled that the tax applies to property that escheats to the State for lack of heirs.

"The Federal estate tax is imposed upon the transfer of the net estate, determined in the manner prescribed, of every person dying after September 8, 1916. The tax is not laid upon the property, but upon its transfer from the decedent to others. The subject of tax is the transfer of the entire net estate, not any particular legacy, devise, or distributive share. It is not an individual inheritance tax. The value of the separate interests and the relationship of the beneficiary to the decedent have no bearing upon the question of liability or the extent thereof. The transfer of property is taxable, although it escheats to the State for lack of heirs." Art. 1, Regs. 37.

Thus where a net estate of $10,000,000 escheats to the State, the latter must pay a tax, under the 1916 law, of $841,000, and under the present law, $1,681,500. The State is required to pay a tax of from 8% to 16% upon property which is vested in the State solely by virtue of its own laws. The natural and necessary effect of this application of the estate tax is that the State is subjected to a tax upon its property in violation of the established principle that property of the several states is not subject to taxation by the Federal Government.

"The exemption of the State's property and its functions from Federal taxation is implied from the dual character of our Federal system and the necessity of preserving the State in all its efficiency." South Carolina *v.* U. S. 199 U. S. 437, 456.

Example II. — Suppose a net estate consisting of personal property of $20,000,000, and a will giving specific legacies to various collaterals amounting to $16,000,000 and the residue to the testator's child.

The estate tax under the 1916 law would be $1,-841,000, and under the present law, $4,181,500. The residue of $4,000,000 given to the child would thus be reduced to $2,159,000 under the 1916 law and under the higher rates of the present law, would be wholly extinguished. Can it be said that a death duty which so alters the proportion between the several shares of distributees is not an interference with the power of the State to regulate the devolution of property?

Example III. — Suppose a net estate of $20,000,000 with real estate of $16,000,000 given to the children, and the residue, consisting of personalty, to the testator's widow.

The result is the same as in Example II. Under the present law, the widow's interest is extinguished; under the 1916 law it is reduced from $4,000,000 to $1,841,000. This results from the provisions of these laws making the tax payable so far as possible from the personal prcperty which comes into the executors' custody.

The foregoing examples seem to show that the Estate Tax in its natural and necessary effect not merely diminishes the distributive shares, but alters the proportion between them.

In Knowlton *v.* Moore, the succession tax was sustained because it was a tax on the recipient. The government in this case says there is no difference in principle between that tax and the 1916 estate tax. It is respectfully submitted that there is this very marked difference:

The burden of the succession tax fell upon the recipient of the legacy or devise, and was measured by the value of such legacy or devise. The estate tax is generously measured by the aggregate of all the successions and may be paid wholly from the share of one of many distributees and thus establish a new devolution of the testator's property.

Since the decision in the case of Knowlton *v.* Moore, it has been settled law that when the administration of decedents' estates has proceeded to the point where the rights of distributees to receive their respective shares has been determined, the exercise of such rights to receive may be made the subject of a constitutional Federal excise tax.

The tax considered in Knowlton *v.* Moore, *supra*, was not imposed until the exercise cf a State's power

of control had been so far completed that there had emerged distinct rights of distributees to receive, and the burden of the tax was cast by the exercise of those rights upon the distributees and not upon the State in the exercise of its power of control.

In Knowlton *v.* Moore, the majority of the Court, through Mr. Justice White, met the objection that the succession tax under consideration was an interference with the power of the State in the following manner:

> "Certainly, a tax placed upon an inheritance or a legacy diminishes to the extent of the tax the value of the right to inherit or receive, but this is a burden cast upon the recipient and not upon the power of the State to regulate."

And later, Mr. Justice White, in his dissenting opinion, in Snyder *v.* Bettman, 190 U. S. 249, 258, referring to the passage above quoted, said:

> "This conclusion was absolutely essential to the construction of the statute in Knowlton *v.* Moore."

The Federal estate tax does not attach itself to the exercise of rights determined by the instrumentalities of the State. It attaches or may attach its burden to the estate before the machinery of State regulation has started. (Sections 200, 205, 206 and 207.)

It imposes duties, obligations and penalties upon executors appointed by the State. It diminishes the distributive shares upon which States levy their toll as the price for the devolution and administration of decedents' estates, and thus diminishes the amount of such toll or price. It alters the proportion of distribu-

tive shares in the case of estates passing by will, — in some cases destroying entirely the residuary estate. In the case of escheat, it imposes a tax upon property which has vested in the State solely by virtue of its own power of regulation, and, to the extent of the tax, removes from the control of the State a portion of the estate which is the subject matter of the exclusive and paramount control of the State.

For these reasons it is submitted that the Act of September 8, 1916, is unconstitutional and void.

THIRD.

The Federal Estate Tax is a Direct Tax and therefore Unconstitutional because not Apportioned in Accordance with the Requirements of the Federal Constitution.

The population of the State of Massachusetts, according to the Census of 1920, was 3,852,356, or 3.64 per cent of the population of the United States. The report of the Commissioner of Internal Revenue for the year 1920 shows (page 50) that during the year which ended with June 30, 1920, Massachusetts estates paid Federal estate taxes in the amount of $6,481,764, which was 6.25 per cent of the whole amount collected in the United States during the same year, approximately twice the amount that would have been collected in Massachusetts if the same aggregate had been apportioned according to the Constitutional rule. The average amount collected per capita in Massachusetts was $1.68 while the per capita average for the whole country was 98 cents. The per capita average for the State of Alabama was 7.2 cents and for the State of Oklahoma 2.7 cents, as shown by the

same authorities. Combined, the six New England states plus New York, New Jersey, Pennsylvania, Delaware, Maryland and the District of Columbia paid 63.59 per cent of the total tax, although they have but 30.06 per cent of the total population. These figures indicate the extent of the injury by reason of the failure to observe the rule of apportionment.

This Court considered at length the distinction between direct and indirect taxes in the case of Pollock *v.* Farmers Loan & Trust Co., 157 U. S. 429, and later in the case of Knowlton *v.* Moore, 178 U. S. 41, 89, and cited many instances of taxes deemed to be excise taxes. It is believed that the invariable test is that in the case of a direct tax there is always present the element of absolute and unavoidable demand. In the case of indirect taxes that element is lacking. In other words, an indirect tax can always be avoided by foregoing the exercise of the privilege to which the tax attaches.

The principle was stated by Alexander Hamilton in the twenty-first number of the Federalist:

> "Imposts, excises, and in general all duties upon articles of consumption, may be compared to a fluid which will in time find its level with the means of paying them. The amount to be paid by each citizen will in a degree be at his own option and can be regulated by an attention to his resources."

Hamilton's view is entitled to great weight because it represents contemporaneous opinion when the Constitution was adopted.

In holding valid a stamp tax (30 Stat. 448) imposed on sales of stock by brokers, in Thomas *v.* U. S., 192 U. S. 363, as the exercise of a privilege, the Court said:

"The stamp duty is contingent on the happening of the event of sale, and the element of absolute and unavoidable demand is lacking."

In Pollock *v.* Farmers Loan & Trust Co., 157 U. S. 429, this Court adopted the same distinction:

"Ordinarily, all taxes paid primarily by persons who can shift the burden upon someone else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, . . . and the payment of which cannot be avoided, are direct taxes." (157 U. S. 429, 558.)

In Nicol *v.* Ames, 173 U. S. 509, this Court in dealing with an excise tax imposed on the privilege of selling at boards of trade, said:

"We think the tax is in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade, or exchanges, for the transaction of business mentioned in the act." (173 U. S. 509, 519.)

"In order to tax it, the privilege or facility must exist in fact, but it is not necessary that it should be created by the Government. . . . A tax upon the privilege of selling property at the exchange, and of thus using the facilities there offered in accomplishing the sale, differs radically from a tax on every sale made in any place. The latter tax is really and practically upon property." (173 U. S. 521.)

In South Carolina *v.* U. S., 39 Court of Claims, 257 (affirmed 199 U. S. 437), direct taxes and excise taxes were distinguished in the following language:

"A tax is obligatory; from it there is no escape. An excise is voluntary; a purchaser who would pay it cannot be compelled to purchase."

It is not enough to justify an excise tax that it be imposed upon a privilege of use. There must be presented also the exercise of the privilege of use. This was distinctly held in McCoach *v.* Minehill, etc., Railway, 228 U. S. 295.

Cooley, Constitutional Limitations, 7th Edition, 680, defines "excises" thus:

> "Excises are taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges."

This definition was adopted in Flint *v.* Stone Tracy Co., 220 U. S. 107.

Instances of excise taxes might be multiplied indefinitely, but it is believed that no adjudicated case can be found in this country of an excise tax where there existed "the element of absolute and unavoidable demand."

Excise taxes as well as other indirect taxes can always be avoided by foregoing the exercise of the privilege to which they attach. From the Federal Estate Tax, however, no escape is possible. The tax attaches to all property at the instant of the owner's death precisely as local property taxes attach to property owned by a living person on April first or on such other date as may be fixed by State law. Like certain local property taxes, it becomes a lien on the property itself and is collectible out of the property itself. It has all the attributes of a direct tax.

Section 201 of the Act of September 8, 1916, provides:

> "That a tax . . . is hereby imposed upon the transfer of the net estate of every decedent."

It is submitted that if the words "the transfer of" were omitted, it would not occur to any one to suppose that the tax was anything but a direct tax. The omission of these words would not in any way affect the other provisions of the act, and it is a fair inference that the sole purpose of the insertion of these words in Section 201 was to give the tax the semblance of an excise tax.

In Collins *v.* New Hampshire, 171 U. S. 30, this Court said:

> "The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language the statute may be framed, its purposes must be determined by its natural and reasonable effect."

Applying this rule to the act in question, it is felt that it has all the attributes of a direct tax. Its direct and necessary result is to levy a tax upon the property owned by a decedent at the time of his death, measured by the value of such property and collectible out of such property, without reference to the shares passing to legatees or distributees, and without reference to their relationship to the decedent.

That this tax is in effect a tax on property and not a tax upon the transfer of property by death, is indicated by those provisions of the act which undertake to tax transfers which were completed during the testator's lifetime.

Section 202 contains the arbitrary provision that the gross estate of the decedent shall include the value at the time of his death of all property

"to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust in contemplation of, or intended to take effect, in possession, at or after his death, except in case of a *bona fide* sale for a fair consideration in money or money's worth,"

and further

"to the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either, or the survivor, except such part thereof as may be shown to have originally to have belonged to such other person and never to have belonged to the decedent."

These provisions are inconsistent with the claim that the Federal estate tax is a tax upon the transfer of property or the transmission of property by death. In both cases the transfer took place prior to death.

If the tax is valid, its natural and necessary effect is to impose a tax at the end of man's life not only upon property which he owned at the time of his death but also property which he had ceased to own at the time of his death.

The meaning of the word "transfer" involves the existence of a transferor, as well as a transferee, and an act in which both participate.

The decedent cannot be regarded as a transferor. His title and ownership cease at the instant of his death, and not until his death is there a change of ownership. That change of ownership results from no act of the former owner, but is wholly created by the operation of the State law.

If it be true that the tax in its real essence is a direct

tax upon property, the fact that it is labelled as a tax on the transfer of property should not prevent its being declared unconstitutional because not apportioned in accordance with the requirements of the Federal Constitution.

This Court in Galveston, Harrisburg & San Antonio R. R. *v.* Texas, 210 U. S. 217, 227, said:

> "Neither the state courts nor the legislatures by giving the tax a particular name or by the use of some form of words can take away our duty to consider its nature and effect."

And in Pollock *v.* Farmers Loan & Trust Co., 157 U. S. 429, 581, this Court said:

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution or of the rule of taxation and representation so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this Court."

The Supreme Court of Missouri in State *v.* Switzler, 143 Mo. 287, 327, 328, considered the constitutionality of an erroneously so-called succession tax statute. In holding the tax to be a tax on property it said:

> "The General Assembly has declared that it intended to levy a 'collateral succession tax', and we all agree that by whatever name this exaction may be called, it is referable to the taxing power of the state. The controlling question is, upon what did it authorize that the tax be levied, upon the property or estate of the deceased person, or upon the right or

privilege of his beneficiaries to receive his estate by inheritance or devise? If upon the latter, it is settled by the great weight of authority that it does not fall within the ordinary taxation of property which our Constitution requires shall be in proportion to its value."

"A 'succession' tax, as the words indicate and the history of such taxes clearly establishes, is an excise or duty upon the right of a person or corporation to receive property by devise or inheritance from another under the regulation of this state. Wherever properly laid this is the distinguishing feature in contradistinction from a property tax. . . . When it is clear that the tax is upon the succession, it is computed not on the aggregate valuation of the whole estate of the decedent considered as a unit for taxation, but on the value of the separate interest into which it is divided by the will or by the statute laws of the State, and is a charge against each share or interest according to its value and against the person entitled thereto."

"Section 1 (*a*) requires the tax to be levied upon the appraised value of the whole estate left by the deceased. The tax is at once levied upon that estate, and the personal representatives of the deceased, not the devisees and legatees, are required to pay the tax. How such a tax differs from general taxes upon the property of the deceased under our system we are not able to state. The mere calling of such a tax a succession tax does not make it different from an ordinary tax on property when the effect and operation are identical with an ordinary property tax."

The case of Dawson *v.* Kentucky Distilleries & Warehouse Company, decided by the United States Supreme Court February 28, 1921, has a bearing on the question whether the Federal estate tax is a direct tax.

The question arose under a Kentucky statute imposing a tax of fifty cents a gallon upon every person

engaged in the business of manufacturing whiskey or "in the business of owning and storing" the same in bonded warehouses within the State, the tax being called in the Statute an "annual license tax", but being payable only when such whiskey was either withdrawn from bond or transferred in bond from Kentucky to a point outside the State.

The case was on appeal from the District Court of Kentucky which had granted an injunction against the collection of the tax. It was admitted by the Attorney-General of Kentucky that the tax was void under the Kentucky constitution if it was a tax on property. The only questions considered in the Supreme Court were (1) whether the case was one for equitable relief and (2) whether the tax was void under the Kentucky constitution. It was recognized that the latter was a question of State law, but not having been passed by the State Courts, it was necessary that it should be determined in the Federal Courts. The decision was against the State on both points.

The Court in unanimously holding the tax to be a direct tax on property said:

> "The question is whether as to such this fifty cents a gallon tax is an occupation tax or is a property tax."
>
> "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents; and obviously it has none of the ordinary incidents of an occupation tax."
>
> "In fact the tax is one imposed upon each lot of whiskey at the time it is removed from bond within the State. The tax might be said to be upon the act of removal from the bonded warehouse within the State. But as stated by the lower court, '*the thing really taxed is the act of the owner in taking*

his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, *i.e.*, consumption, sale or keeping for future consumption or sale. . . . The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value'. *To levy a tax by reason of ownership of property is to tax the property.* Compare Thompson, Auditor, *v.* Kreutzer, 112 Miss. 165; Thompson, Auditor *v.* McLeod, 112 Miss. 383. *It can not be made an occupation or license tax by calling it so.* See Flint *v.* Stone Tracy Co., 220 U. S. 107, 148–150; Zonne *v.* Minneapolis Syndicate, 220 U. S. 187; United States *v.* Emery, 237 U. S. 28."

The estate tax in its natural and necessary effect is the analogue of local property taxes. The provisions in Section 209 declaring the tax to be a lien upon the estate of the decedent, and the provisions in Section 208 providing for the collection of the tax from the proceeds of the sale of the property are patterned in a general way upon long established systems in effect for the collection of local taxes upon real estate.

It is submitted that a tax, the only necessary and essential condition of which is ownership of property at a particular instant of time is in substance and effect a direct tax on property, — that the Federal estate tax is such a tax, and therefore invalid because not apportioned according to Constitutional requirements.

CONCLUSION.

For the reasons which have been stated, it is respectfully submitted that the estate tax imposed by the Act of Congress of September 8, 1916 (39 Stat. 756, 777), is unconstitutional for the reasons:

1. That its necessary operation and effect burden and impair the sovereign rights of the States to regulate descent and distribution; and

2. That in substance and effect, it is a direct tax without apportionment among the States on the basis of population.

J. WESTON ALLEN,
Attorney-General.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1920.

NEW YORK TRUST COMPANY AND ALBERT W. FROSH, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF J. HARDEN PURDY, DECEASED, *Plaintiffs in Error,*

v.

MARK EISNER.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR JAMES A. WENDELL, AS STATE COMPTROLLER OF THE STATE OF NEW YORK.

JOHN R. GLEASON,
Counsel for THE STATE COMPTROLLER OF NEW YORK.
220 BROADWAY,
NEW YORK CITY.

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BRIEF.

AUTHORITIES CITED.

STATUTES CITED.

Supreme Court of the United States,

OCTOBER TERM, 1920.

No. 286.

NEW YORK TRUST CO. *et al.*, as Executors, etc.,
Plaintiffs-in-Error,

v.

MARK EISNER.

BRIEF SUBMITTED BY JOHN B. GLEASON IN BEHALF OF THE STATE COMPTROLLER OF NEW YORK.

POINT I.

The Estate Tax is void if its necessary effect is to make a deduction from the estate or from the transfer prior to the imposition of the State Transfer tax, or if the State tax must be adjusted as stated at page 48 of the brief of the Solicitor General.

At page 48 of the brief of the Solicitor General, after correctly stating the decision in *Matter of Gihon*, 169 N. Y. 443, refusing to make a deduction

from the New York transfer tax on account of the Federal legacy tax of 1898, it is said:

> "Of course a different rule would have applied if one of the taxes had been an estate tax, which must be paid before the amount for distribution and, therefore, the amount to be received by the legatees and devisees could be ascertained. In such cases, of course, the estate tax is first deducted, and the legacy tax is imposed on the amount to which the legatee is entitled after the estate tax has been deducted from the net estate. In the present case it happens that the estate tax—that is, the tax which must be paid before the share of the legatee can be ascertained,—is the tax levied by the Federal Government."

But the State of New York refuses to permit any deduction on account of the estate tax;

> *Matter of Bierstadt*, 178 App. Div. 836.
> *Matter of Sherman*, 179 App. Div. 497; affirmed without opinion, 222 N. Y. 540.

In each of these cases, in my brief for the State Comptroller, the constitutionality of the Federal estate tax was directly challenged, if construed otherwise than as a legacy tax. In the *Bierstadt* case, the court expressed the opinion that if the tax was not a legacy tax it was void as a direct tax on property. In the *Sherman* case the court decided that the New York transfer tax law did not contemplate or permit any deduction on account of the Estate Tax, and also said:

> "The conditions of transfer have been embodied by the State in the Transfer Tax Law. If the Federal Government may impose an inheritance tax which is entitled to be deducted from the estate prior to the assessment of the State Transfer Tax, *it has interfered* with such conditions, and has diminished the amount

which the State has appropriated as a condition of the transfer being had, by the percentage upon the sum appropriated by the Federal Government. The State Transfer Tax will thus have become one not upon the whole estate transmitted, but upon the whole estate less the amount of the Federal tax * * * The constitutionality of a Federal act entitled to such construction and effect might well be doubted."

In *Matter of Penfold*, 216 N. Y. 163, the residuary legatee complained because in adjusting the transfer tax upon the transfer to him, the tax was measured upon the value of the property as of the date of death, although as the result of large losses in realizing upon the securities, he actually received much less; also he complained because no deductions were allowed on account of the transfer taxes of other States. The Court of Appeals having upheld the method of taxation, he obtained a writ of error to this court, which was dismissed for want of jurisdiction (*Penfold* v. *State Comptroller*, 248 U. S. 537).

In my brief in that case, it was claimed that the power of the State was plenary, and that no Federal question was presented.

As regarded the assignment of error for refusal to deduct the inheritance taxes of other States, the brief of the plaintiffs-in-error in the *Penfold* case urged many and more reasons than those announced by the Supreme Court of California in *Estate of Miller*, Calif. (61 Calif., Dec. 90, decided Jan., 1921), where that court held that the inheritance tax of Nevada must be deducted from the California estate before computing the California transfer tax, because the authority of the State of Nevada over the stock of one of its corporations was superior to the law of the domicil, etc. That court

also decided that, assuming the validity of the Federal estate tax, it must also be deducted.

It seems that the dismissal of the writ of error in the *Penfold* case sanctions the position that it is for the *State* to say whether or not it will permit the deduction of the Federal estate tax, and that this court will not so construe this tax as requiring the State to measure its tax in the manner indicated by the brief of the Solicitor General; for then the statute will regulate the transfer tax law of New York, and the difference between such regulation and the present operation of the New York transfer tax law is a difference of some millions of dollars yearly.

The 1919 rates take 25% of all sums over $10,000,000, which would here mean a loss to the State of one-fourth of its tax at its highest graded rate.

Examples of regulation of transfer:

1. *Transfer without residuary clause.*

Gross estate	$13,240,000
Debts and expenses	1,000,000
Net estate	$12,240,000
Passing to A	$12,240,000

2. *Under will with residuary clause.*

Gross estate	$13,240,000
Debts and expenses	1,000,000
Net estate	$12,240,000
Passing to legatee A	$10,000,000
Passing to residuary legatee R.	2,240,000

Legatee A in each case receives $10,000,000, no matter by what name the tax is called. The rest equals the estate tax at 1919 rates. In the second example the entire residuary estate equals the estate tax. The tax at 1916 rates is $1,065,000.

The foregoing instance is approximated to an actual case in the New York transfer tax office where, however, the estate tax is larger and does not exactly equal the residuary estate. Any example is adequate, but the foregoing is easy to follow and it will be seen that each increase of $4,000,000 over the above example would be a loss of $1,000,000 of property taxable by the State, if the estate tax should be deducted before the computation of the State tax. If we *must* do this, it is respectfully submitted that, by whatever name the tax is called, and we should prefer to call it by some hard name, the law of property of the State of New York has been regulated by the Federal statute. To follow the reasoning of this court by Mr. Justice Peckham in *Nicol* v. *Ames,* 173 U. S. 509, 515, *et seq.*, in a passage rather too long to quote 'no abstruse or subtle distinction, or microscopic examination is called for, or any scientific or economical problem. This is a practical matter and a court'

> "would not be justified in placing it in a class different from which its practical result would consign it. Taxation is eminently practical, and is, in fact brought to every man's door, and for the purpose of deciding upon the validity a tax should be regarded in its actual practical results" (*id*).

In New York it is a law of property that a man shall have more than a life estate in his property, upon condition of the payment at death of a per-

centage called the transfer tax. If, for example, the State had adopted a "*fee-farm*" tenure of real estate, reserving to itself the title and a perpetual rent, the interest of the feoffee would be transmitted at his death, nor could Congress by an estate tax diminish the rights of the State. The matter will be further considered *infra*.

In point of fact, the State transmits by as many different transfers as there are legatees. Each act of transmission is not divisible into parts, as in the rule of *Se offendendo*, laid down in Hamlet following *Hales* v. *Petit*, 1 Plowden, 253.

There is an *instant* vesting at death in the legatees of that part of *ownership* of the net estate which made the ownership of the decedent greater than a life estate, and deemed to be of its value at the date of death.

The entire net estate is lawfully in the transmission, and Congress imposes its tax upon the value at death of the property in the transfer. If the case is the descent of real estate worth $12,240,000 to the heir, with no other property or debts, there is no inch of this real estate which does not descend to the heir, but the whole of the property is received by him at the instant of death, and the tax is properly computed upon the full value of the property transmitted. Inasmuch as there is no property to pay the tax except the property in the transfer, the transferee must pay it. Title *of the transferee* is unquestionable and the situation is as if he gave his individual bond, for the immediate payment of the tax on account of this valid transfer to him, and secured by mortgage upon the property.

New York regulation of transfers wherein death is a determining factor.

Tax Law, S. 220. "A tax shall be and is hereby imposed upon the transfer of any property * * * to persons and corporations * * * I. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed thereof while a resident of the state" etc.

Gross Estate.

In the adjustment of the tax, the actual value of the gross estate at the date of death is taken as the starting point (as is also the case with the Federal estate tax). From this value is deducted the debts and expenses of administration. It is a rule of property in New York that the portion of the gross estate which is appropriated by law to the payment of debts and administration expenses does not vest in the beneficiaries—does not pass to them.

Matter of Gihon, 169 N. Y. 443.

Expenses of Administration.

These are incidental disbursements made, subject to the approval of the surrogate, for counsel fees, advertising for creditors and the like, but the executor in making up his accounts is not always careful to discriminate between the fund for the obligations of the decedent incurred in his lifetime, and his official disbursements, and disbursements in fact for the account of certain of the legatees.

Net Estate.

The remainder (as in the Federal statute) is the net estate, which is deemed to be transferred to the

beneficiaries proportionately, so that in the second example above given there is

A fund not passing to the legatees.....	$1,000,000
A transfer to legatee A...............	10,000,000
A transfer to residuary legatee R......	2,240,000
Gross estate	$13,240,000

In this regulation, the interest of the residuary legatee is as definite and certain as is the interest of any other legatee, although it will inevitably happen that the amount actually received by him on the final distribution will differ from these figures (*Matter of Penfold, supra*).

The terms *legatee, legacy, legacy tax* are conveniently used with reference to the above situation, whether arising by will or by intestacy.

Vesting.

The rights of the *legatees* vest at the death of the decedent.

In *Matter of Ramsdill,* 190 N. Y. 492, 495-496, the highest court of New York quoted with approval the following from

> *Hooper* v. *Bradford,* 178 Mass. 95, 97 (opinion by Mr. Chief Justice Holmes followed in)
>
> *Kingsbury* v. *Chapin,* 186 Mass. 533:

> "The rights of all parties, including the right of the Commonwealth to the tax, vest at the death of the testator. It is true that the interest of the legatee is subject to an accounting, but it is an interest in an existing fund and is analogous to that of a *cestui que trust*".

In the New York statute (as well as in the Federal statute) the *legatees* are conclusively deemed to receive the portions of the net estate thus vested in them at death.

Classification of Transfers.

(1) *Transfers where the executor receives nothing.*

This large and important class includes

(1*a*) Real estate passing by intestacy or by will without an active trust.

(1*b*) Estates by Entirety, and joint estates

(1*c*) Transfers *inter vivos,* in contemplation of death, or intended to take effect in possession or enjoyment at death.

Intresting examples under this heading are supplied by

Matter of Orvis, 173 App. Div. 1; affirmed 223 N. Y. 1.

Matter of Garcia, 183 App. Div. 712.

(2) *Transfers by intestacy.* The statute of descent of real estate differs from the statute of distribution of personalty to the next of kin, as regards representation, and it may happen that one person who takes but part of the real estate will take all the personalty.

(3) *Transfers by will.* (3*a*) Where the estate is divided proportionately; (3*b*) Where there is a residuary clause. Large estates ordinarily pass under a will containing a residuary clause. *A direction in a will to pay inheritance taxes from the residue* increases the legacies by the amount of the tax (*Matter of Gihon, supra*).

The Executor.

The executor, including in this term *an administrator,* is an *officer* appointed by the Surrogate and is required to take an oath of office (Code of Civil

Procedure, § 2568 *"Official oaths of executors, &c."*).

The State confers upon him certain rights of administration regarding the property vested in the *legatee*, enabling him to take the personal property into his possession, as well as real estate held upon an active trust, giving him remedial rights in aid of this possession, and with the right and duty to convert into money the portions required to pay the debts and his expenses, or receivable by the *legatee* in money.

He represents the power of the State and not of the testator. He is a receiver appointed by the court and subject to its direction He is the custodian of two funds, one of which is the fund in which the creditors have a vested right—plus his incidental disbursements,—and the other fund is the net estate as above defined and in which the legatees have vested rights. For the purpose of the adjustment of the transfer tax (as well as of the Federal tax) he is *deemed* to have the net estate as above ascertained. *Case of tax lawfully assessed against the legatee, where the executor receives no money.* Such a case was presented by *Matter of Meyer,* 209 N. Y. 386, where a transfer tax was assessed against the legatee according to the value at death of mortgaged property, upon which the mortgage was subsequently foreclosed and the equity was destroyed—*held;* that the executor was not personally liable to pay the tax, despite the command of the statute.

Inasmuch as the executor is the custodian of two funds; one fund for the payment of debts and one fund comprising the net estate transmitted to the legatees, the Federal law must tell him from which fund he shall pay the Federal tax. If he pays from

the first fund, he pays a debt of the decedent; if he pays from the second fund, he pays for the account of the legatees proportionately. Upon the assumption that the Federal estate tax was of the same character as the State tax, as a tax on the transfer, Mr. Surrogate Fowler, in *Matter of Bierstadt*, 166 Supp. 168, stated the case of the tax upon the transfer of a bequest of $10,000 to a nephew where the State tax is taken as $500 and the estate tax as $100, as follows:

> "The net amount which the legatee would receive from the executor would be $9,400. *But that would not be the value of the property transferred to the legatee under the will* of the decedent. The actual value of that transfer was $10,000. The $500 tax paid to the State of New York was not transferred to it by the will of the decedent, neither was the $100 paid to the United States transferred to it by the will of the decedent." (Italics ours.)

Here it may be noticed that if the executor pays the Federal estate tax without objection and the parties to the final accounting admit the legality of the payment, so that it is allowed to the executor as a disbursement, the adjudication of the surrogate allowing the payment as a disbursement cannot be reviewed on appeal, but only the question whether, assuming the validity of the tax, is it payable from the estate, as a debt, or is it paid for the account of the legatees. In the absence of a construction of the estate tax by this court, this question has been answered differently in different jurisdictions. In *Matter of Hamlin*, 226 N. Y. 407, the Court of Appeals of New York, assuming the validity of the Federal tax, was of the opinion that the tax was to be charged against the residuary estate. Such also was the opinion of the Appellate Division in *Matter*

of Sherman, supra, but further deciding that the New York transfer tax law did not contemplate or permit the allowance of such a tax as in diminution of the State transfer tax, a decision affirmed by the Court of Appeals.

American Statutes.

All these statutes impose taxes upon the transfer of any property by will or intestate law, to any person (or 'except those hereinafter exempted'); or use the words 'all property which shall pass by will &c. to any person &c.' (or except those hereinafter exempted), or in case of Vermont and Virginia use special language imposing *legacy* taxes, and are *legacy* taxes similar to the New York statutes; except

Utah (Comp. Laws 1907, §§ 1220-*x et seq.*) imposes *legacy* taxes graded by the size of the net estate.

Rhode Island.

Laws 1916, Chap. 1339.

S. 1. "A tax shall be and is hereby imposed upon the net estate of every resident decedent &c. * * * as a tax upon the right of transfer.

S. 5. "A tax shall be and hereby is imposed upon the transfer * * * to any person * * * as a tax upon the right to receive."

English Estate Duty.

Stats. 57 and 58 Victoria, ch. 30, p. 53.

Estate Duty.

In the case of every person dying

"* * * there shall * * * be levied and paid upon the principal value ascertained as herein-

after provided of all property, real and personal, settled or not settled, which passes at the death of such person a duty called 'Estate Duty' at the graduated rates hereinafter mentioned."

POINT II.

The tax is upon the transfer of the net estate to the beneficiaries and is paid by them or for their account proportionately; for no one else has any money to pay it.

The name by which the tax is described in the statute is immaterial:

Dawson v. *Kentucky D. & W. Co.*, U. S. , decided Feb. 28, 1921, *infra.*

The definition of the tax is as follows:

Estate Tax, § 201. "That a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the value of the net estate to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent. * * *"

Net Estate.

The brief of the Solicitor General correctly states (p. 28):

> "* * * net estate—that is that portion of the estate which, as a result of the death was transferred to the beneficiaries."

The term is not a term or work of art, but coincides with the net estate as regulated by the laws of New York, but with an exemption of $50,000, which is an act of grace and does not affect the legal questions.

Substituting the language of the Solicitor General, the section is

> *That a tax is hereby imposed upon the transfer of that portion of the estate which, as a result of the death, was transferred to the beneficiaries.*

This is the operative—the dynamic—section of the Act.

Applying the section to example (1), *supra,* the Act says:

> *That a tax is hereby imposed upon the transfer of the net estate of $12,240,000 to the legatee A.*

The transfer which has been regulated by the State is recognized as a valid transfer.

The term *transfer,* like the term *property* is of too definite a nature to be affected by what people in Congress thought about it. The decision in *Gleason* v. *Thaw,* 236 U. S. 558, appears to be in point; where the court justly omitted to consider the claim of the brief of the plaintiff-in-error that the debate upon the Bankruptcy bill evinced an intent to extend the amendment to all cases of actual fraud by the use of the term *property* to include the Constitutional meaning that Labor is property.

In every transfer, there is a transferor and a transferee and a definite amount of property transferred, and the power of the State regulating and validating the transfer. The *amount of the prop-*

erty transferred by the transferor is the amount of the property received by the transferee, valued as at the instant of death. The Federal Government finds these transfers ready made and undoubtedly may tax them. In so doing it does not change the character of the transfer, which does remain, and must remain a valid transfer to the transferee of the property transferred. The instances of transfers between the living referred to in the brief of the Solicitor General are in point. If A transfers 100 shares of stock to B, Congress may tax this transfer as a valid transfer, but cannot change it in any way, as, for example, by taking ten shares out of the transfer. If A joins in one deed a transfer of Blackacre to B and of Whiteacre to C, Congress may tax these transfers, as valid transfers, but cannot change the transfer of all or any of the property named in the deed. In each of these examples, Congress in imposing a tax upon the transfer may lawfully direct that the transferor shall pay it, as by stamps affixed. But suppose that he does not pay it, the transfer of the property to the transferee remains valid, because as a transfer it is wholly regulated by the law of the State. If Congress should enact that the above named deed should not be recorded until the stamps were affixed, such a law would be void (*Cooley Const. Lim.*, 6th ed., 592). If the facts were that two pieces of real estate named in the deed comprised all the property of the vendor, it would be necessary to follow the lien upon the property transferred, and the vendees paying the tax would pay it proportionately. It is conceivable that one might reach into a sealed envelope in lawful transmission to me containing money and a deed, and get my money, or reach into a cargo of livestock, but it is impossible for the Government to alter the transfer specified in sec-

tion 201; it must accept the transfer as regulated by the law of the State.

By the device of wresting or rescuing statements from their context in the cogent and admirable brief of the Solicitor General and interpreting them a bit, an agreement with some of the foregoing views might appear to be indicated.

p. 30 "This is a tax simply upon the transfer of property as a result of death.

p. 11 "The power so brought in being is the power to impose a tax on the transmission of property from the dead to the living.

p. 21 "the power of the State to regulate the transmission of property does not exclude the power of Congress to tax that transmission when regulated."

p. 25 "*one person must transmit and another receive, before it can be said there is a transmission.*" (Italics ours.)

p. 26 "there is no difference between the nature of a right to transmit property by will, or as the result of death and the nature of the corresponding right to receive such property. The two rights together make possible the transmission from the dead to the living."

p. 27 "The actual transfer which results from death is in fact the transfer by which the beneficiaries finally receive the property."

Therefore it may seem unnecessary to enquire whether Congress might have taxed something else than this transfer as thus regulated. The language of the section is clear. It follows that any subsequent declaration of Congress to collect this tax upon the transfer out of anything else than the property in the transfer will be nugatory; for there is no such other property. If the direction is to forcibly withdraw it from the transfer and reduce

the transfer by the amount thus withdrawn, then the transfer is regulated by the Federal Government.

Sec. 207. "That the executor shall pay the tax to the collector"

Such a direction is common to all inheritance tax statutes and is within the power of the Federal Government to the extent that the executor has any portion of the property transmitted to the legatees. But the transfers may be all or mainly in class (1), *supra,* and the tax may be paid out of them, by some one not the executor. Thus, if the decedent has given $1,000,000 to his wife, as in *Matter of Garcia, supra,* reserving rights to himself during his life, the transfer is taxable as part of the net estate transferred and at the same rate, and assuming that the tax is $1,000,000 it may all be collected from the widow, *or only the portion upon* which she is subject to a tax, if any,—according to the proper construction of Section 209, which logically should precede section 208.

Section 209:

> "That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent" * * *
>
> "* * * If the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a *bona fide* sale for money or money's worth) *and if the tax in respect thereto is not paid when due,* the transferee or trustee shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, shall be subject to a like lien equal to the amount of such tax." (Italics ours.)

Cf. s. 409. As to *Insurance Moneys.*

In New York we have all sorts of such transfers *inter vivos*. The simplest case is where the grantor conveys say $1,000,000 absolutely, subject to the payment of the income thereof to himself during his life. He may live many years thereafter, but a tax is payable by the beneficiary at the date of the conveyance, computed upon the value of the estate to take effect in enjoyment at death, although no one ever pays it, and so that at death it is taxed as the transfer at death of $1,000,000. Or, as in *Matter of Garcia, supra*, the conveyance may be testamentary—the difference being that the grantor could not revoke the first conveyance, but could revoke the second. Section 209 speaks as if it had the first kind of conveyance before it. Inasmuch as the $1,000,000 of my example forms part of the gross estate, the section starts with saying that it may all be taken for the tax, by enforcing the lien against it. It also speaks of the tax *in respect to this particular conveyance*, as if constituting a separate transfer, taxable at the graduated rate of the net estate, say, 10% or $100,000.

Section 208:

> "If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

This section has 65 words between two commas in a sentence of 146 words, and irresistibly reminds one of the answer of Dean Alford—when a book called "The Dean's English" complained that one sentence was capable of 216 meanings—"that he did not write for fools": for this section is written for wise men.

These two sections are capable of the construction that the words of section 209

> "if the tax in respect thereto is not paid when due * * * such property * * * shall be subject to a like lien to the amount of such tax"

indicate a tax with respect to this particular transfer; that if the total estate tax is, say, $1,000,000, the whole of the particular transfer may be impounded under the general lien or sold by the collector under the provisions of the first part of section 208; that then if the tax or any part of it *beyond the tax in respect thereto named in section 209* is paid out of the particular transfer, there shall be reimbursement or a just and equitable contribution, the intent being that so far as is practicable *and unless otherwise directed by the will of the decedent* the tax shall be paid out of the estate passing to the beneficiaries before its distribution.

Turning now to section 408 of the Act of 1919, it states at the end of it:

> "If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000 of such policies bear to the net estate."

Looking at section 409, it is seen that this insurance money is in the same category as the transfers in contemplation of death, &c. It seems that this particular transfer must pay the tax, less its exemption. That other constructions are practicable, is in no way disputed, but they must do some violence to some language and must fail to give any effect to the words *the tax in respect thereto* of section 209.

The objection to taking away from beneficiaries, by the guise of a tax, sums varying by reference to the total of the net estate, is not escaped by an estate tax, meaning by *an estate tax* a tax whose incidence is that of a debt of the decedent. In all cases there is no difference, as regards the effect of the Federal tax on the beneficiaries, whether it is a legacy tax or an estate tax, *except* the case of a will with a residuary clause, and except for further inequalities which might be dug out in the case of transfers where the executor receives no money. In cases of intestacy it ordinarily happens that some of the next of kin take by representation and unequally. So soon as they take unequally, there is the inequality of the rate graded by the size of the estate, as compared with others in smaller estates and in the same degrees of relationship. Therefore any example whatever will show inequality, and the following example may be offered. An intestate; net estate $1,000,000; next of kin—three brothers, four nephews, sons of a deceased brother, five grandnephews, sons of a deceased nephew who was son of the deceased brother. Another intestate; net estate $50,000; next of kin five grandnephews. Each of the above grandnephews receive $10,000. In the first estate each contributes or loses $515 at 1919 rates, and in the second estate each contributes or loses $100.

Going back to the figures of the very first example, if a resident of Pennsylvania died intestate after having made a gift to his wife of $10,000,000 to take effect in enjoyment at his death and left a son, and real estate in New York worth $2,240,000, and the widow pays the tax, then she is entitled to reimbursement from the son, which will sweep away his whole estate, by the force of the Act. These extreme instances point to an inherent inequality, varying only in degree. The same thing will happen in every will where the testator divides his estate proportionately, or gives bequests exceeding his net estate. And how is this inequality remedied? By exempting all the legatees but one from any tax, where there is a will with a residuary legatee, and making him pay the tax for all of them.

It has been shown, *supra*, that in the regulation of transfers by the State of New York, there is a fund for the payment of debts, which does not pass to the legatees, and the rest, less administration expenses, is vested at the instant of death in the legatees and the share of the residuary legatee is certain, because capable of being rendered certain by the deduction of the legacies from the net estate. This is the transfer which section 201 purports to tax. If there were a valid tax imposed upon the property in the lifetime of the decedent, as, for example, installments of the income tax falling due after death, these would be deducted from the gross estate in the same way as any other direct obligation of the decedent, and the tax of section 209 would fall upon the net estate as thus constituted. But the "estate tax" is upon a transfer which carries all the money to the legatees. Now what has happened to the residuary legatee of example II, *supra?* He has paid a tax of $89,600 to the

State of New York as the condition of the transfer to him of this $2,240,000, but the Federal Government says that he cannot have any of it, in the construction of the Solicitor General. There is no presumption that rich men know very much; even Mr. Frick, who was a very wise man, appears to have been greatly in error as to the size of his residuary estate. In making his will the ordinary citizen may have thought that he had a right to rely upon the fact of these transfers as regulated by the law of the State and that the Federal Government would not seek to change this situation, and that if it attempted to place all its tax on any one of his beneficiaries that the attempt would be vain; or he may not have given any thought to the subject, believing his estate to be much greater than the future would disclose.

Query, if the tax is not valid if construed to be a legacy tax.

The question remains whether the Act, if taken to be what section 201 declares it to be, a tax upon the transfer to the beneficiaries, is void if apportioned between the beneficiaries according to the size of the net estate. Even if this large tax be deemed unjust, injustice justly distributed wrongs no one. The legislator says that the tax is justly distributed because in all estates of the same size it is the same. It will be noted that in *Knowlton* v. *Moore*, Mr. Justice Harlan and Mr. Justice McKenna were of the opinion that that legacy tax was graduated by the size of the estate and valid, nor did the majority opinion say that the Act thus construed would be void.

The alleged injustice of *any* graded rate must be excluded. As regards transfers in a non-resident

estate, a State may attain to the inequalities of the estate tax, *as to transfers within its jurisdiction*, by a development of the tax upheld in *Maxwell* v. *Bugbee*, 250 U. S. 525, measuring its tax upon the property within the jurisdiction by reference to the total size of the estate wherever situated, and the total amount passing to the beneficiary, thus producing double taxation at the highest graded rate of each State, but not criticised on that account in the dissenting opinion, which proceeded on the ground that the practical result was the taxation of property without the State. Now if, in the large estate, the size of the legacy is in relation to the size of the estate, that relation is a ground of taxation. But the legislator says that there is such a relation; and that the small legatee in the large estate should be thankful that the estate was large, instead of finding fault about his tax; for if the estate had been smaller he would not have received anything.

POINT III.

If the tax is "an estate tax" it is void as a regulation of the transfer, and as a tax on property without apportionment.

In the inadequate time allotted me for the preparation of this brief, I will try to obviate the need of a review of authorities by beginning with the approved definitions of *Austin:*

> *Austin's Lectures on Jurisprudence* (Campbell ed.).

Power: Lecture XVI, pars. 572-3:

"What is meant by saying a right is a power? The party invested with a right is invested with that right by virtue of the corresponding duty imposed upon another or others. And this duty is enforced, not by the power of the party invested with the right, but by the power of the State 573. It may indeed be said that a man has a power over a thing or a person when he can deal with it according to his pleasure free from obstacles opposed by others. Now, in consequence of the duties imposed upon others he is thus able. And, in that sense, a right may be styled a power. But even in this sense, the definition will apply only to certain rights to forbearances. In the case of a right to an act, the party entitled has not always (or often) a power."

Property, L. 58, Par. 1056:

"Property or dominion * * * is applicable to any right which gives to the entitled party an indefinite power or liberty of using or dealing with the subject" (*indefinite,* as explained not susceptible of positive and exact circumscription, cf. 1067-8, 1085).

Rights of Property, L. 51-2:

Par. 1094: "When we speak of a right we can only, using language accurately refer to the present moment. A future right is a contradiction in terms. * * * But the purpose of the concession by the State may regard the future, and so far as that purpose regards the future, the State may confer a present right. 1095. By the term *concession*—* * * I mean the entire sum and scope of the acts, intentions, purposes and desires of the State as declared or indicated at the given epoch in relation to the use and enjoyment, present and future, of the thing, the subject of the concession, and the interests of the various members of the community therein. 1096. Now the concession

may be calculated to confer enjoyment upon one or more persons either for a limited period or for an unlimited period, * * * as 'to A and his heirs forever'."

Absolute property or dominium:

1103. "It is a right imparting to the owner a power of indefinite user, capable of being transmitted to universal successors by way of descent, and imparting to the owner the power of disposition from himself and his successors *per universitatem* and from all other persons who have a *spes succesionis* under any existing concession or disposition, in favor of such person or series of persons as he may choose, with the like capacities and powers as he had himself, and under such conditions as the municipal or particular law allows to be annexed to the dispositions of private persons."

To these general statements may be added that *privilege* as referred to property, is a right of property, more properly applying to exemptions from such burdens as others are subjected to, and also, in a well defined sense taken from the Civil Law, to a *jus in re* arising from the nature of a debt which has been contracted with reference to a specified thing. *The right of creditors to have the property of a decedent applied to the payment of their debts is a privilege.* The important right of obtaining credit is correlative to this privilege of creditors.

It follows that the brief of the Solicitor General errs in stating at page 41 that Congress might have measured its tax upon the gross estate of the decedent; which would permit the imposition of this tax in an insolvent estate; a thing that the State of New York cannot do (*Matter of Watson*, 226 N. Y. 384, 402) or has so regulated its law of property that this privilege of creditors is paramount.

The State may change its laws of property in certain ways, and in particular with regard to the rights to have the property transferred at death to the *legatees*. A tax upon the right to have the property transferred at death, is a limitation of the right of property, a regulation of the right. The property thus taken is withdrawn from the property, by virtue of the power of the State to regulate rights of property and the transfer thereof—a right which the Federal Government does not possess. The tax upon the transfer of what by law may be transferred has been repeatedly upheld in this court as a regulation of the transfer, as in

Mager v. *Grima,* 8 How. 490, 493:

> "Now the law in question *is nothing more than an exercise of the power* which every state and sovereignty possesses, *of regulating* the manner and terms upon which property real and personal within its dominion may be transmitted by last will and testament, or by inheritance." (Italics ours.)

This language has been often quoted in the opinions of this court, and always with approval, as in *Maxwell* v. *Bugbee,* 250 U. S. 525, and is also quoted with approval in *Matter of Watson,* 226 N. Y. 384. And in *Snyder* v. *Bettman,* 180 U. S. 249, 250, it was said:

> "that the inheritance tax of the State was in reality a limitation upon the power of the testator to bequeath his property to whom he pleases."

Obviously a Federal tax cannot be upheld upon any such ground. Not being apportioned, it cannot be upheld as a tax either upon the right to transmit, or as a tax upon the right to receive; for these are correlative rights of property. But if the State

were impeded, in the same way as the Federal Government, by the existence of a right which required the State to permit the transfer of the entire property of A to a certain party B, then the State itself could not regulate the transfer, although it might impose a tax upon the transfer, and necessarily payable by B, in the event that A is gone forever and all his property is in the transfer.

Taking any transfer as regulated, as for example the transfer of Blackacre, worth $12,240,000 from a decedent having no other property and no debts to the heir H, upon condition of the payment of the State Transfer tax,—a necessity imposed by the Estate Tax to take away $2,240,000 and to impose the State tax only upon $10,000,000 is a regulation of the property law of the State of New York and also regulates the transfer. The Government, under the guise of an indirect tax at death upon the transfer of the property, which it recognizes and must recognize as a valid transfer, cannot make the incidence of the tax such as to change the transfer. It seems clear that a construction must be given to the Act that it does not interfere with the power of the State to impose its transfer tax as before. Even so, the Courts of New York will be confronted with case where the residuary legatee, upon whom a State tax has been imposed, has had all or the bulk of the residue swept away by the Federal tax. The right of the State to impose its tax under these circumstances is challenged, by reason of the alleged manifest injustice now appearing, as well as by want of power to tax that which has been taken by the power of the Federal Government. Therefore the State Comptroller is still constrained to object that an estate tax is void, both as a regulation of the transfer and as a tax upon property.

A man does not have two kinds of ownership—ownership and a right to transmit that ownership; the right to transmit that ownership is included in the ownership. Ownership of real estate in fee includes the right of enjoyment of the use of the property; right to borrow the full value of the perpetual use upon a mortgage payable at a specified time after his death; the right to credit upon the strength of this ownership; the right to have the property transmitted after his death in accordance with the law of the State; and certain incidental and remedial rights going to make up the right of property; and further the right to sell the things which are the subjects of these rights to others who will then have like rights—thus giving to these things, also called property, *value* in exchange. The market value of all these rights of ownership at any time constitutes the worth of his property at that time. *Without the right of transfer at death, ownership would be cut down to a life estate.* Therefore the right to be transmitted and the right to be received qualify the objective property. Where the brief of the learned Solicitor General suggests that this is a tax against the decedent, or upon a right owned by him, a direct tax upon property is indicated. Thus, page 41 of that brief:

> "It says to the owner of property *you have the right* upon your death *to have your property transmitted* and distributed as you may direct by will or as may be provided by State law, *and as against that right there shall be assessed a tax.*" (Italics ours.)

If Government can tax this right, it does not need to wait till a man's death to tax it. It may tax it, as does the State in his lifetime, as part of

his ownership. A tax upon an inseparable incident of ownership is a tax upon property.

This precise point seems to be covered by the decision of this court in *Dawson* v. *Kentucky D. & W. Company*, decided February 28, 1921, involving the validity of the statute of Kentucky imposing a tax of fifty cents a gallon as "an annual license tax" upon every person engaged in the business of owning and storing whisky and payable only when such whisky was withdrawn from bond, or transferred in bond from Kentucky to a point without the State. The court said:

> "The name by which the tax is described in the statute is, of course, immaterial. * * * 'The whole value of the whisky depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value'. To levy a tax by reason of ownership of property is to tax the property."

If this objective property consists of a bag of gold coins, there inheres in these coins value in exchange, the power of commanding this or that fine thing and in selecting and feasting through the power of one of these coins in exchange, and the best or worst that one could do would be to keep on increasing the number of these coins owned by him, but at his death the coins are exactly the same as before. If such a decedent also had a life estate in realty and an annuity, his rights in these ceased at his death, but the coins have been transmitted to the legatees. The only thing for the Federal Government to tax is the transfer to the legatees; for all the continuing rights which made the ownership of the coins different from the ownership of the life estate or annuity, have been

transferred to the legatee by the power of the State. It will be noticed that in this analysis, the right to transmit and the right to receive are parts of the rights of property and are not taxed, but the transfer is taxed, and as stated in *Scholey* v. *Rew*, the legatee may be directed to pay the tax, because of the benefit to him; following the well known rights of the Federal Government in the collection of a tax which is a lien upon property transmitted to some one. If the legatee should renounce, the Government would proceed against some one else.

In *Knowlton* v. *Moore*, the transmission tax before the court did not regulate the transmission in any way, and it appears to have been taken for granted that a tax which did regulate the transmission would be void. And it was expressly recognized at page 83:

> "For the purposes of deciding upon its validity a tax should be regarded in its actual practical results."

The practical result of an appropriation of property by a tax upon a right of property has been shown. Now the enjoyment of those rights which go to make up rights of property include activities and events of all sorts, as in the taking of my whisky from the bonded warehouse, planting my garden in the event of receiving seeds from my congressman, as well as many things of a serious and important nature, and a tax with respect to any of these things would be direct, while the tax upon the exercise of any particular activity pursued for gain would be indirect. It is now well settled that such a tax is a tax upon the exercise of the right and not upon the right itself.

Thus in *Flint* v. *Stone-Tracy Co.,* 220 U. S. 107, the court said:

p. 151 "As was said in the *Thomas* case, 192 U. S. 363, *supra*, the requirement to pay such taxes involves the exercise of privileges and the absence of absolute and unavoidable demand is lacking. If business is not done in the manner prescribed in the statute, no tax is payable."

p. 155 "The tax in this case, as we have construed the statute, is imposed upon the exercise of the privilege of doing business in a corporate capacity, as such business is done under the authority of State franchises."

As regards the suggestion that there was an unavoidable demand for the tax, as regarding business transacted in the portion of the year preceding the passage of the Act, that point was not raised in the brief of the appellants in *Flint* vs. *Stone-Tracy Company,* nor in the brief of the appellants in *Billings* v. *United States,* 232 U. S. 261, nor in any of the briefs in those cases, so far as my examination of the records has disclosed.

The French inheritance tax is a tax on *mutation* and is a legacy tax.

If we fall back upon the French definition, death is the event or determining factor of the transfer of the rights of property, but not the determining factor of the rights themselves which continue to inhere in the objective property transmitted, leaving that property of the same amount and value as before.

The concession of the State, being the concession of enjoyment for an unlimited period—as to A and his heirs forever—the life enjoyment by A, or its cessation, is not a function of the concession, which is always unlimited, except by such conditions as the State may impose. This would be very

clear if all such concessions were of entailed estates; then all would say that the event that happened at death was the transmission of the property, and no one would think of going back to the estate of A for a tax when all had been transferred to H by the terms of the concession. Accurate analysis shows no difference in the present situation, as regards the question here presented. The concession of the State permitted A to sell or to give away Blackacre in his lifetime, but inasmuch as he did not do so, what remains is the fact that the State instead of keeping the property as its own has permitted him to name the persons to whom it will transmit the property, instead of the State naming them, or the State says that if he dies intestate the State will name such and such persons to whom the property shall be transmitted. The whole difficulty here arises from the failure to distinguish what the State may do and what Congress without apportionment may do. The State may say that, as a condition of continuing its concession, a percentage of the property shall be paid at death, for the continuance of the concession and not transmitted to the legatee. This Congress cannot do. Or the State may say that all the property shall be transmitted at death to the person whom it permits the decedent to name as the recipient, upon the condition of the payment of a percentage by the recipient. Congress cannot interfere with this regulation of the transfer, although finding a transfer thus regulated it may tax the transfer to the legatee. In *Knowlton v. Moore* the court affirmed the right of Congress to tax the transmission to the legatee as regulated. The attention of the court was not directed to the fact that a tax in the form now contended for by

the Solicitor General would change the transmission to the legatee, nor was any such tax before the court for its decision.

The brief of the plaintiffs in error starts from the position of the District Court at page 11, that the tax is on the privilege of transfer by death—on the right of the decedent to have the estate pass by will or intestacy—and argues that this makes the words *upon the transfer* nugatory. The argument of the brief for the State Comptroller of New York starts from the assumption that this is a transfer tax and seeks to show that to be valid, it must be imposed as a tax on the transfer, and not by taking property out of the transfer, which, to that extent, would make the transfer nugatory.

It is obvious that the question of what Parliament might do has no relation to the peculiar rights of Congress. *Scholey* v. *Rew*, 23 Wallace, 331, is not an affirmance of the validity of the stamp tax provisions of the Act of 1864, which were not before the Court. Scholey sued to recover the amount of the succession tax at 6% upon the succession to real estate of the value of $45,000; total tax paid $2,700. It seems clear from the record that he never paid any stamp tax, which would have been $5. This case has been criticised in that

> "The distinction between the power of a State and the power of the United States to regulate the succession of property was not referred to and does not appear to have been in the mind of the court. The opinion stated that the Act of Parliament, from which the particular provision under consideration was borrowed had received substantially the same construction, and that cases under that Act held that a succession duty is not a tax upon

income or property, *but upon the actual benefit derived by the individual.*" (Italics ours.)

Pollock v. *Farmers Loan and Trust Company*, 57 U. S. 429, 557;

Quoted in

Knowlton v. *Moore*, 178 U. S. 41, 80.

The speedy recognition of such inadvertence justifies the statement (*Iliad*. 4, 405).

ἡμεῖς τοι πατέρων μέγ᾽ ἀμείνονες εὐχόμεθ᾽ εἶναι.

Respectfully submitted,

John B. Gleason,
Counsel for the Comptroller of the
State of New York,
233 Broadway,
New York City.

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No. 286.

In the
Supreme Court of the United States

October Term, 1920.

NEW YORK TRUST COMPANY and ALBERT W. PROSS, as Executors of the Last Will and Testament of J. Harsen Purdy, Deceased,

Plaintiffs in Error,

vs.

MARK EISNER,

Defendant in Error.

Brief on Behalf of Clara B. Congdon, et al., Executors, Submitted By Their Counsel as Amici Curiae.

Edgewater Press, Printers, 14 N. First Ave. E., Duluth.

ARCADIUS L. AGATIN and
FRANCIS H. De GROAT,
as *Amici Curiae*,
Duluth, Minnesota.

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CITATIONS

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BRIEF OF COUNSEL, AMICI CURIAE

Through the courtesy of counsel in the above entitled cause, and by the indulgence of this court, permission has been given Clara B. Congdon, Walter B. Congdon, Edward C. Congdon, and Marjorie C. Dudley, as executors of the last will and testament of Chester A. Congdon, deceased, to file this brief herein as *amici curiae*, for the reason that the decision in this cause will have direct effect and bearing upon that certain cause now pending in the District Court of the United States, for the District of Minnesota, Third Division, wherein they, as executors as aforesaid, are plaintiffs, and Edward J. Lynch, as Collector of Internal Revenue for the District of Minnesota, is defendant; and the executors, availing themselves of the

privilege accorded, through their counsel, respectfully submit the following brief;

INTRODUCTION

The action below, brought by these plaintiffs in error as executors of J. Harsen Purdy, deceased, against Mark Eisner, the Collector of Internal Revenue of the United States for the Third District of New York, for the recovery of the sum of $23,910.77, assessed by the Commissioner of Internal Revenue of the United States, and imposed by Title II of the Revenue Act of 1916, as an estate tax upon the estate of said decedent, raises, in substance, the following questions, among others (Record, pp. 11, 12) viz.: the invalidity on constitutional grounds, of Title II of the Revenue Act of 1916, in that: the enactment diminishes and impairs the exercise by the several states of their exclusive constitutional right to control and regulate transmission or succession to property on death, and imposes such grossly unequal burdens and effects such arbitrary and unreasonable discriminations, upon or in respect to property and persons, as to deprive persons of their property without due process of law.

STATEMENT

By the Act of Congress of September 8, 1916, generally known as "Estate Tax Act" a tax equal to certain percentages of the value of the net estate is imposed upon the transfer of the net estate of every decedent dying after

the passage of the Act. The attack upon this Act with which this brief is concerned is made upon the following grounds:

> FIRST: That by its operation and effect, the Act in question casts a burden upon the power of the States to regulate transmission of property occasioned by death.

> SECOND: That the tax imposed is so arbitrary, unequal and unjust, and so wanting in any proper basis for classification as to amount to confiscation of property, in violation of the Fifth Amendment.

Before reaching the conclusions it was deemed essential to discuss and consider several propositions involved, and which may be stated as follows:

1. Whether by the Act in question a burden is cast upon the states' power of regulation involves primarily a proper understanding of the nature and character of the powers of the states to regulate transfers occasioned by death and of the rights resulting therefrom on the one hand, and the nature and extent of the powers of Congress to impose so-called death duties upon the other; and for that reason the respective powers of the states and of Congress must be first considered.

2. After defining and ascertaining the said respective powers, it will then be proper to more closely examine the nature of the state's power to regulate in the light of the decisions of this court, so as to more accurately ascertain and define the boundaries of the power of Congress to super-impose a tax upon a subject concerning which the states have exclusive power.

3. These propositions being disposed of, we shall be in a position to discover whether the measure adopted over the subject so operates upon it as to cast a burden on the states' power to regulate such subject, and therefore, to make it a prohibited exaction; and independently of that question, whether the scheme of this tax is not so entirely wanting in a proper basis for classification as to result in grossly unequal burdens upon persons in like situation, and therefore to cause a spoliation of property.

While the conclusions arrived at depend upon the application of principles, some of which seem almost self-evident, yet in view of the magnitude of the question involved, and more especially because of the apparent general misconception of the principles on which *Knowlton v. Moore*, 178 U. S. 41 (44 L. Ed. 969), was decided, the authority of which case is mainly relied upon to justify the imposition of a tax of the nature of the one in question, it has seemed necessary to consider the nature of the powers exerted in the imposition of "death duties."

The foregoing propositions will be discussed under the following headings:

FIRST: *Legislation referable to entirely different legislative powers may affect the same subject, but where either state or nation possesses an exclusive power respecting a subject, the measures of the other may not affect that subject until such exclusive power of the one shall have been expended.*

SECOND: *The transmission of property on death is acknowledged to be within the exclusive power of the states to regulate, and all manifestations of that power are de-*

signed for the entire result and the production of a uniform whole, by the authority solely possessing the power.

THIRD: The true test of the validity of the Estate Tax depends upon its operation and effect as enforced, and not upon the manner in which the taxing scheme has been characterized. So viewed, the Act clearly casts a burden upon or usurps the power of the states to regulate transmission of property on death.

FOURTH: Though there may be a seeming exercise of the taxing power, the Act complained of is so arbitrary as to constrain to the conclusion that it is not the exertion of taxation, but a confiscation of property, or so wanting in basis for classification as to produce such a gross and patent inequality as to lead inevitably to the same conclusion.

ARGUMENT

FIRST

Legislation referable to entirely different legislative powers may affect the same subject, but where either state or nation possesses an exclusive power respecting a subject, the measures of the other may not affect that subject until such exclusive power of the one shall have been expended.

As the exercise of a particular power, whether by the national or state governments, is necessarily to be measured by the scope of the right giving warrant to the

power, so in the determination of the nature and character of the Estate Tax, it becomes imperative to ascertain whether the power of Congress seeking exercise through the Estate Tax Act is within the true limits of the power of the national government.

It is common knowledge that the same measure, may according to circumstances, be arranged with different classes of power, and that Congress and the states may adopt measures similar in character in the execution of the powers committed to them; and that the same measures, or measures which are scarcely distinguishable from each other, or which approach each other so nearly as to be confounded, may flow from distinct powers and that this does not prove that the powers themselves are identical.

The powers, some alike, others distinct and exclusive, in character, lodged with the states and the nation for carrying out their respective purposes often appear to conflict, and the measures taken in their execution appear to interfere, until the objects or occasions inducing action establish the individuality of the powers finding exercise. It is in the field of those powers whereof exercise has been exclusively committed, either to the national government or to the states, that contests arise, for it is between a power of that character when exercised by the one possessing the authority and the more general power exercised by the other, in respect to an identical circumstance or occasion or having operation on the same object, that questions are presented whether such exclusive power of the one is abridged by the measure taken by the other.

When then, the national government, which possesses only certain enumerated powers, and the state governments, which retain all powers not delegated to the Union, make common use of measures with a view to the subjects

respectively committed to them, neither is exercising the power of the other. But when either thus proceeds in respect to a matter which is the especial concern of the other, that one is doing the very thing which such other is authorized to do.

These principles were enunciated by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat., 1, 199, 205. For the reason that one government is not sovereign which is subject to the will of another, the aid of these principles has been frequently sought in definition of the power of the national or state governments when questioned, in consequence of measures taken by them, as is shown by many decisions of this court.

In *Knowlton vs. Moore*, 178 U. S., 41, there was an exposition of the power of Congress exercisable in respect to taxation on the occasion of the transmission of property by death, wherein due regard to the foregoing principles was shown.

It is an axiom that "the positive authority of a decision is co-extensive only with the facts on which it is made." Expressions beyond the case may be respected but ought not to control the judgment in a subsequent suit when the very point is presented for decision, *Cohens v. Virginia*, 6 Wheat, 264-399. But expressions necessary to a decision are controlling in a subsequent suit where the very point presented is the same. Thus *Knowlton v. Moore* stands as an authority for the imposition by Congress of a tax of the nature, operation and effect of that there considered. It is not an authority for the imposition of a tax of a different nature, operation and effect. But the delimitation of the power of Congress to impose taxes upon the occasion of the transmission of property by death,

necessary to that decision is controlling here, for the power or authority relied upon is necessarily the same.

It was observed by that decision that the transmission or receipt of property by death is a usual subject of taxation. It was also observed that the right and consequent power to regulate successions is vested in the states and not in Congress. Indisputably the taxing power of Congress, subject to compliance with the limitations of the Constitution, extends to all usual objects of taxation. Whilst conceding that proposition it was nevertheless urged as one of the major contentions against the validity of the tax there under consideration, that the power to regulate successions being exclusively vested in the states, as a necessary consequence Congress was without power to tax the transmission or receipt of property by death. Authority for the contention was sought in the decisions holding that as the states cannot impose burdens on the exclusive powers of the national government, or the means taken to execute them, so conversely the same limitations rest on the national government. The contention obviously assumed that the two powers finding exercise must come in collision, because the taxation imposed by Congress upon the transmission or receipt of property by death was an exercise of the states' acknowledged power to regulate successions or necessarily burdened that power. Thus the argument wholly overlooked *that at some point the power of the states becomes expended and regulation ceases*, and that in consequence from that point the inhibition upon the national government no longer has operation.

Manifestly at some point regulation must cease, and at that point an object or a subject arises which may be within the purview of other powers of the state and national governments. Hence, if the transmission or receipt of property

by death is a usual subject of taxation, then when the independent and exclusive power of the states to regulate that transmission shall have been exhausted or expended by the perfection of the rights concerning the thing transmission or succession on death involves, the power to tax possessed by the national government may extend and be applied to that subject. When thus considered, the power of the states and the power of the national government, having no claim to identity, and between which no analogy may be drawn, may find expression, each within its proper sphere, and have operation to the attainment of its own particular ends, in respect to the same situation or circumstance without resulting conflict, nor abridgement by one of any right or authority of the other.

That such was the conclusion reached by Chief Justice White, then Associate Justice, (for, were it otherwise the respective powers of the states and the national government must be mutually exclusive as respects many objects of taxation) is shown by the following excerpt from the opinion of the court, pp. 59, 60:

> " * * * the proposition denies the authority of the states to tax objects which are confessedly within the reach of their taxing power, and also excludes the national government from almost every subject of direct and many acknowledged objects of indirect taxation. Thus, imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the state cannot be taxed, because it had been at some prior time the subject of exclusive regulation by Congress? Again, interstate commerce is often within the exclusive regulating power of Congress. Can it be asserted that the property of all persons or corporations engaged in such commerce is not the subject of taxation by the several states, because Congress may regulate interstate

commerce? Conveyances, mortgages, leases, pledges, and, indeed, all property and the contracts which arise from its ownership, are subject more or less to state regulation, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto cannot be taxed by Congress, even in the form of a stamp duty. It cannot be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the national and state governments are devested of those powers of taxation which from the foundation of the government admittedly have belonged to them."

The states may not tax imports nor impose burdens upon interstate commerce, because to do so must be a resumption of the power formerly possessed by them, and which they surrendered or delegated. On the other hand, the national government may not regulate successions, for so to do must be an assumption of the power to do the very thing the states are alone authorized. At some point the power to regulate imports has been attained. At some point as the result of exercise of the power to regulate interstate commerce property has arisen. At some point the power of the states to regulate conveyances, mortgages, etc. and all property and contracts which arise from its ownership finds its expression. And also, at some point the power to regulate successions has consummated its purpose in perfecting in the successors the rights yielded by the states, and in prescribing the conditions upon which those rights may be enjoyed. At that point the exclusive power of one authority ceases and the power of the other attaches.

The extraordinary situation of two distinct and in many respects independent governments over the same territory and the same people, each possessing not only powers

indispensable to its existence, but powers in respect to objects committed to its care preserved by restraints from interference, presents no little difficulty in holding the proper balance between those governments and their respective powers. As was said in *McCulloch v. Maryland,* 4 Wheat. 316: "Each is sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." But the questions nevertheless recur, where or at what point the control of one ceases, which enables full play of the power of the other, as illustrated in *Brown vs. Maryland,* 12 Wheat, 419; *Welton vs. Missouri,* 91 U. S. 275; *Leisy vs. Hardin,* 135 U. S. 100 and many other cases subsequently decided; and whether the measures taken by one are leveled against the legitimate powers of the other, as illustrated by *Cohens vs, Virginia, supra,* and more recently by such cases as *Galveston etc. Ry. Co. vs. Texas,* 210 U. S. 217, and *Western Union Tel. Co. vs. Kansas,* 216 U. S. 1.

These questions found solution in *Knowlton vs Moore,* as is shown by the opinion, which says:

> "Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient, and not upon the power of the state to regulate."

Is it not clear that that expression has force only when the object which is taxable by the national government is viewed as the transmission of property by death accomplished through the medium of the states' power? Or when it is considered that the power of regulation is the factor involved in transmission and that recognition thereto is given when seizure is made at the point where the power

expends itself in consummating rights in successors? When the states' power is thus viewed standing between the decedent and the successors, saying what shall pass and upon what condition, is it not the factor in transmission? How else may the power to regulate be given untrammelled exercise? It should be here noted that the above expression of Mr. Justice White was of the very essence of the decision, as was explained in the dissenting opinion in *Snyder v. Bettman*, 190 U. S. 249, 258, where he said:

> "This conclusion was absolutely essential to the construction of the statute in *Knowlton vs. Moore.*"

To cast the burden so that it shall not fall on the power of the states in any case is possible obviously, only when the power of the states shall have been expended in respect to the objects of that power. That is to say, when the rights or privileges with which the power of the states has concern find consummation in consequence of the execution of that power, then has the states' regulation ceased, which enables the power of the national government to have operation. This is what was meant by the reference quoted above, concerning the right of the states to tax property once the subject of importation when commingled with the goods of the state, though imports are exclusively within the taxing power of Congress, and the right of the states to tax property engaged in interstate commerce, though such commerce be within the control of Congress. Upon any other theory the particular measure taken by Congress must be deemed to have been aimed at the power of the states, and to have denied to the recipient the right of using the privilege which he had purchased from the

state, until he should also have purchased it from the United States, which manifestly cannot be true. Pertinent is the remark in *McCulloch vs. Maryland, supra*:

> "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission" * * *

Hence it is to be deduced, from the decision in *Knowlton v. Moore*, that when the states had expended their power by the introduction of "legacies and distributive shares," that thereby a subject of taxation was opened to the national government; and when it was determined that the tax in that case was imposed upon the "transmission or receipt of legacies and distributive shares" occasioned by death, and that the burden was upon the recipients and not upon the power of the states to regulate, that conclusion could have been reached only by regarding the tax as laid upon the *fact* of transmission or receipt of legacies and distributive shares produced and existing from the exercise of the states' power, and not upon the *act* of receiving legacies and distributive shares. Were it not so, obviously a condition must have been interposed upon the exercise of the states' power, or of the rights accorded legatees and distributees which were within the protection of that power until consummated.

So the delimitation of the power of the national government drawn in *Knowlton vs. Moore* (and again by Justice White in his dissent to *Snyder vs. Bettman*, 190 U. S. 249, 257), viz:

> "The United States not possessing, as the states do, the right to regulate successions, when the United States calls into play its taxing power over the subject

> of the passage or receipt of property by death, the extent of its authority is to be measured solely by the scope of the taxing power conferred by the Constitution."

is conclusive upon the same question which the Estate Tax presents.

It thus appears that the decision in *Knowlton vs. Moore* in upholding the law there involved, as against the objection that it cast a burden upon the states' power of regulation, was based, not upon the ground that Congress had power to tax any subject within the protection of the states' power to regulate, but on the contrary the ground of the decision was that the tax there involved, being a burden cast solely upon the recipient, was a tax upon a subject, which had ceased to be a subject of states' regulation. Thus, the case of *Knowlton vs. Moore*, when viewed in the light of the principles here discussed, stands as an affirmative authority for the proposition that the power of Congress to tax transmission of property by death can only be lawfully exercised upon a subject, upon which the power of regulation of the state has been so far expended and its regulation so far completed as to introduce a new subject, open to the taxing power of Congress. The importance of bearing in mind the principles thus deduced from *Knowlton vs. Moore* will become more apparent when we reach the question of what is the operation and effect of the Estate Tax Act, wherein it will be shown, that the particular subject has not been changed in its identity as a subject of the states exclusive control, when intercepted by the particular mode of operation of the tax provided by said Act.

SECOND

The transmission of property on death is acknowledged to be within the exclusive power of the states to regulate, and all manifestations of that power are designed for the entire result and the production of a uniform whole, by the authority solely possessing the power.

The power to regulate a thing, is that power to prescribe the rule by which the thing is to be governed. "To regulate implies in its nature, full power over the thing to be regulated; it excludes necessarily the action of all others that would perform the same operation on the same thing." "A regulation when adopted is designed for the entire result, and the production of a uniform whole." *Gibbons vs. Ogden, supra.*

So, when the states attach certain privileges and exemptions to the exercise of the right to transmit or to receive property on death, over which their control is absolute, there must be implied a purpose to exercise that control. It cannot be doubted that at the time of the passage of the Act providing the Estate Tax, Congress found the several states in possession of this power; nor can it be doubted that all the states are by their laws asserting that power, and giving active operation to it, through their statutes of descent and testamentary succession, and measures of taxation predicated thereon.

Recognition of the right of the states to the exclusive exercise of that power is amply attested by a great number of decisions of this court reviewing state decisions, which had upheld a variety of state enactments making assertion of the power, on the grounds urged that such enactments

came in conflict with provisions of the United States Constitution, or treaties entered into by the United States, or burdened the instrumentalities of the United States.

Thus in *United States vs. Fox,* 94 U. S. 315, there was involved the validity of a devise of lands to the United States made by a New York testator, under a statute authorizing devises to be made to persons capable by law of holding real estate, and to corporations authorized by charter or statute to take. This court said:

> "The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted * * * The power of the state in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the state, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal government was created, and would seriously embarrass the landed interests of the state."

It was stated by Mr. Justice Holmes in the dissenting opinion in *Chanler v. Kelsey,* 205 U. S. 466, 479, 480 (premising his argument upon that very proposition, which was affirmed by the majority opinion in that case), that:

> "A state succession tax stands on different grounds from a similar tax by the United States or a general state tax upon transfers. It is more unlimited in its possible extent, if not altogether unlimited, and therefore it is necessary that the boundaries of the power

to levy such taxes should be accurately understood and defined.

"I always have believed that a state inheritance tax was an exercise of the power of regulating the devolution of property by inheritance or will upon the death of the owner,—a power which belongs to the states; and I have been fortified in my belief by the utterances of this court from the time of Chief Justice Taney to the present day, *Mager vs. Grima*, 8 How. 490, 493; *United States v. Perkins*, 163 U. S. 625, 627, 628; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 288; *Plummer v. Coler*, 178 U. S. 115, 124, 126, 137; *Billings v. Illinois*, 188 U. S. 97, 104; *Campbell v. California*, 200 U. S. 87, 94; *Cahen v. Brewster*, 203 U. S. 543, 550; see also *Re Sherman* 153 N. Y. 1, 4. For that reason the power is more unlimited than the power of a state to tax transfers generally, or the power of the United States to levy an inheritance tax. The distinction between state and United States inheritance taxes was recognized in *Knowlton v. Moore*, 178 U. S. 41, 58, and whatever may be thought of the decision in *Snyder v. Bettman*, 190 U. S. 249, I do not understand it to import a denial of the distinction reaffirmed by the dissenting members of the court, 190 U. S. 256."

To this list of cases cited may be added *Prevost v. Greenaux*, 19 How 1; *Frederickson v. Louisiana*, 23 How. 445; *Orr v. Gilman*, 183 U. S. 278; *Blackstone v. Miller*, 188 U. S. 189, 207; *Board of Education v. Illinois*, 203 U. S. 553, 562, 563; *Tilt v. Kelsey*, 207 U. S. 43; *Keeney v. New York*, 222 U. S. 525; *Peterson v. Iowa*, 245 U. S. 170, 173; and *Maxwell v. Bugbee*, 250 U. S. 525.

Brief references to a few of the cases may be permitted to show how explicitly this court has recognized the nature of the power exercised by the states, viz.:

United States v. Perkins, 163 U. S. 625, concerned the taxability under the New York law of a bequest made by

a testator to the United States. The tax having been sustained by the New York Court of Appeals, in *Matter of Merriam,* 141 N. Y. 479, against the contention that the state had no power to tax the property of the United States, on writ of error this court said:

> "We know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good.
>
> "In this view, the so-called inheritance tax of the state of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the state has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the state has a right to require a contribution to the public treasury before the bequest shall take effect. Thus, the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee."

In *Billings v. Illinois,* 188 U. S. 97, it was asserted that the Illinois inheritance tax law, denied the equal protection of the laws guaranteed by the 14th Amendment, and this court said:

> "We must regard the power of the state over the testate and intestate dispositions of property, its power to create and limit estates, and, as resulting, its power to impose conditions upon their transfer or devolution. It is upon this power that inheritance tax laws are based."

Board of Education v. Illinois, 203 U. S. 553, involved the exclusion of foreign corporations from the exemption allowed by the Illinois law on property devised for educational purposes. The act was claimed to be an abridgement of the privileges and immunities of citizens of the United States, or a denial of the equal protection of the laws. This court said:

> "It must be kept in mind that the controversies in this case depend upon the power of the state over inheritances, and the conditions she may put upon them in the exercise of that power * * * A Federal court would hesitate indeed to put impediments on this power or declare invalid any classification of persons or corporations that had reasonable regard to the purposes of the state and its legislation."

Plummer v. Coler, 178 U. S. 115, there involved was the question of the taxability under the New York Transfer Tax Act of a legacy consisting of United States bonds, in the face of the Federal statute declaring such bonds exempt from state taxation in any form. It was urged against taxability, that there was an inherent lack of power in the state to tax because of the restraint, and that the tax impaired and burdened the borrowing power of the United States and was therefore unconstitutional. Nevertheless this court said:

> "* * * we may regard it as established that the relation of the individual citizen and resident to the state is such that his right, as the owner of property to direct its descent by will, or by permitting its descent to be regulated by the statute, and his right as legatee, devisee or heir to receive the property of his testator or ancestor are rights derived from and regulated by the state."

What is observed particularly in the cases of *United States v. Perkins* and *Plummer v. Coler,* is, that this court did not seek to place the exercise of power upon an unwarranted right to tax but, on the contrary yielded to and expressly affirmed the plenary power of the state to regulate successions.

Peterson v. Iowa, 245 U. S. 170, concerned the validity of the Iowa law imposing death duties on legacies to non-resident aliens at a higher rate than those imposed on legacies to residents of the state; and the claim was made that the act violated "the most favored nation clause" in a treaty between the United States and Denmark. Chief Justice White said:

> "It is obvious that the article places restrictions upon the authority of the respective countries to impose taxes, duties or charges under the circumstances and conditions for which it provides * * * the case here presented concerns only the power of the state of Iowa to deal with a citizen of that state and her property there situated, while the prohibitions of the treaty, giving to them their widest significance, apply only to a citizen of Denmark and his right to dispose of his property situated in the state of Iowa."

The distinction between the power to regulate and the power to tax was here observed, for had the power put in exercise been the power to tax, manifestly it would come into collision with the provisions of the treaty.

The principle thus recognized in *Knowlton vs. Moore* has never been denied, nor in any respect modified. Since but two cases (*Murdock v. Ward,* 178 U. S. 139, decided at the same term, and *Snyder v. Bettman*, 190 U. S. 249, arising later) concerning the tax on legacies and distributive shares imposed by the Revenue Act of 1898, have dealt with

the principle established by it. Both were decided upon its authority. *Murdock v. Ward* involved the taxability of United States bonds. The contention against the validity of the tax was that "Congress had no right or authority to impose or assess any tax" upon the bonds of the United States. The decision was placed upon no assumption of a right to regulate on the part of the United States, but upon its power to tax an object existing perforce of the state laws. The validity of the tax was rested solely upon the principle that a non-taxable factor may be employed to measure a tax upon a subject within the taxing power.

Snyder v. Bettman involved the taxability of a legacy given to a municipality in Ohio. Though expressions not necessary to the decision were given in the majority opinion, it is clear that the only point of difference between the concurring and dissenting Justices was in respect to subjecting an instrumentality of a state government to a tax. Whilst conceding that Congress had no power to regulate successions, nor to burden a state or its municipal corporations the majority were of the opinion that the tax being "incidental" or indirect was therefore not objectionable as a burden on such instrumentality. The dissenting Justices held the view that the tax extended to an object which Congress "has no power under the Constitution to tax at all, either directly or indirectly."

The principle extracted from a review of the cases cited, that the subjection by the states of the "right or privilege of transmitting" or the "right to dispose" (as defined in *United States vs. Perkins, supra*); the "right to inherit property; or to receive it under testamentary disposition" (as defined in *Maxwell vs. Bugbee, supra*) or the right or privilege to take by devise or descent (as defined in *Magoun v. Illinois Trust & Savings Bank, supra*), however various-

ly termed, to the burden of a tax, is a mode or measure adopted in regulaton of transmission or receipt of property by death, *and is an exercise of the power in that respect by the authority solely possessing it;* and, the individuality of the power being thus established, that no interference or restrictions upon the exercise of that power *in any of its manifestations* may be made by the United States, short of giving effect at most to such limitations as are prescribed, or attach t· al! free governments, for the maintenance of equality and freedom from arbitrary or discriminatory action.

From the review of the principles enunciated by the foregoing cases there can be no doubt that that is the firmly established doctrine of this court. It is true that in *Scholey vs. Rew;* 90 U. S. 331, the court in referring to the Federal tax there involved said that it was "plainly an excise tax or duty" upon "the devolution of the estate or the right to become beneficially entitled to the same or the income thereof in possession or expectancy," but that expression was used solely for the purpose of meeting the objection that the tax was direct; the question of the exclusive power of the states not being there involved as was pointed out in *Pollock vs. Farmers' Loan & Trust Co.*, 157 U. S. 429, 578, where this court said:

> "The distinction between the power of a state and the power of the United States, to regulate the succession of property was not referred to, and does not appear to have been in the mind of the court." (Cited and quoted in *Knowlton v. Moore*, p. 80.)

It is obvious therefore that in view of the full recognition of the states' exclusive power accorded in the cases above reviewed, all of which were decided subsequently to

Scholey vs. Rew, the court's expression in that case that the tax there involved was upon "the devolution of the estate or the right to become beneficially entitled" must stand limited as being a tax upon a subject upon which the states' power of regulation had been fully expended.

Indeed, an examination of the decisions of this court involving taxes when imposed by Congress on the occasion of the transmission of property on death, clearly discloses that the taxes there considered *were in fact and in terms imposed upon subjects which had been introduced through the exercise of the states' power of regulation, and after that power had been expended thereover. Scholey vs. Rew, supra; Clapp vs. Mason,* 94 U. S. 589; *Wright vs. Blakeslee,* 101 U. S. 174; *Mason vs. Sargent,* 104 U. S. 689; *Sturges vs. United States,* 117 U. S. 363; and *United States vs. Marion Trust Co.,* 143 Fed. 301, aff. 206 U. S. 567 without opinion, and later cases dealing with refundment of taxes under the 1898 Act.

THIRD

The true test of the validity of the Estate Tax depends upon its operation and effect as enforced, and not upon the manner in which the taxing scheme has been characterized. So viewed, the Act clearly casts a burden upon or usurps the power of the states to regulate transmission of property on death.

The argument thus far has sought to define the boundaries of the power of the United States to superimpose

a tax upon a subject over which the states have the exclusive power of regulation, exercised by their laws of descent and testamentary disposition supplemented by a mode of taxation, so that in the examination of the character of the Estate Tax, the subject matter upon which imposed, and the operation and effect of the tax, it may be ascertained whether those boundaries are or can be observed.

Before examining, however, the character of the Estate Tax or the subject matter upon which imposed, as it is characterized by the language of the statute, let us first consider the operation and effect of the tax as enforced, as an aid to the solution of the question whether or not the exaction is beyond the taxing power of the United States.

(a) The operation and effect of the tax as laid and measured, and not the subject of taxation, determines whether a burden is cast upon the state's power of regulation.

At the outset it should be borne in mind that in *Knowlton vs. Moore* it was determined, that the subject of taxation was "the transmission or receipt of property by death"; that transmission of property by death was a matter within the power of the states to regulate and not within the power of the United States; that Congress could not burden that power; that the tax was measured by the value of each legacy and distributive share, and hence *no burden was cast on the states' power to regulate*, but rested wholly on the recipients. In other words, the natural operation and effect of the tax was such as to allow untrammelled operation of the states' power of regulation exerted to the point of consummation in legatees and heirs of legacies and distributive shares.

That the validity of a tax, in operation and effect, does

not alone depend upon the selection of a valid and lawful subject of taxation is clearly demonstrated in those cases where states have imposed taxes upon corporations engaged in interstate commerce. The subject of taxation is generally the privilege of exercising the corporate franchises within the state, or the property therein employed in business,—a subject admittedly legitimate. The impositions take the form of license fees or of taxes on property, measured by a variety of standards. The states may not of course burden the Federal interstate commerce power, and whether a particular tax does or does not burden such power depends upon the operation and effect of the tax, and not upon the subject of taxation, as is shown by numerous cases, among which are: *Western Union Telegraph Co. vs. Kansas,* 216 U. S. 1; *Gloucester Ferry Co. vs. Pennsylvania,* 114 U. S. 196; *Philadelphia & S. Mail S. S. Co. vs. Pennsylvania,* 122 U. S. 326; *Meyer vs. Wells, Fargo & Co.* 223 U. S. 298; *Galveston, H. & S. A. R. Co. vs Texas,* 210 U. S. 217; and *Fargo vs. Hart* 193 U. S. 490; where the subjects of taxation were such corporate franchises or privileges, or property employed, and the taxes were measured by the amount of the entire capital stock employed in interstate commerce, or by the amount of dividends declared out of earnings from all sources, or by the amount of gross receipts derived from tolls or transportation in interstate as well as intrastate business.

Thus, in *Western Union Telegraph Co. vs. Kansas, supra,* where the state of Kansas attempted to exact a tax of the Western Union Telegraph Company under the name of a "charter fee," of a given per cent of the entire authorized capital of the company, this court in holding that the operation and effect of the statute was to cast a burden on interstate commerce said, among other things:

"Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the telegraph company, as a charter fee, of a given per cent *of its authorized capital,* representing, as that capital clearly does, *all* of its business and property, both within and *outside of the state, a condition* of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the state, but a burden and tax on the company's interstate business and on its property located or used outside of the state. The express words of the statute leave no doubt as to what is the *basis* on which the fee specified in the state statute rests. That fee, plainly, is not based on such of the company's capital stock as represented in its local business and property in Kansas. The requirement is a given per cent of the company's authorized capital; that is, all its capital, wherever or however employed, whether in the United States or in foreign countries, and whatever may be the extent of its lines in Kansas as compared with its lines outside of that state. What part of the fee exacted is to be attributed to the company's domestic business in Kansas, and what part to interstate business, the state has not chosen to ascertain and declare in the statute. It strikes at the company's entire business, wherever conducted, and its property wherever located, and, in terms, makes it a *condition* of the company's telegraph right to transact purely local business in Kansas that it shall contribute, for the benefit of the state school fund, a given per cent of its whole authorized capital representing all of its property and all its business and interests everywhere."

Further illustration may be found in a large number of cases decided by this court involving the question of property taxes levied by states on goods in transit, collected in 12 *Corpus Juris*, page 98, Section 128, where the proposition is thus clearly stated:

"A state tax on oil, goods, live stock, or other property in transit from one state to another is void, and it is immaterial whether the tax is laid by the state of origin or the state of destination. In the one case the protection of the commerce clause has attached, and in the other such protection has not ceased"

It is unnecessary to multiply the cases. Those cited clearly enunciate the principle, that though measures be taken in respect to lawful objects by the imposition of taxes upon legitimate subjects of taxation, nevertheless the tax may be so laid or measured that in its operation and effect the burden becomes so cast as not to bear solely upon the rightful thing, but immediately and directly upon the exclusive power of another sovereignty.

If such a burden bears upon the exclusive power of one sovereignty so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. *Stockard vs. Morgan* 185 U. S. 27, 37; *Asbell vs. Kansas*, 209 U. S. 251, 254, 256; *Western Union Telegraph Co. vs. Kansas, supra*, p. 24.

Whether measures taken by the states on the one hand and by the national government on the other, come in conflict, can, when the individuality of the respective powers are established, be arrived at, only by determining from the operation and effect of the measure taken by one whether a burden is cast upon the exclusive power of the other. *Gibbons vs. Ogden, supra*; *Brown vs. Maryland, supra*; *Cohens vs. Virginia, supra; McCulloch vs. Maryland, supra; Almy vs. California*, 65 U. S. 169; *Collins vs. New Hampshire*, 171 U. S. 30; *Galveston, H. & S. A. R. Co. vs. Texas, supra; Western Union Telegraph Co. vs. Kansas, supra; International Paper Co. vs. Massachusetts*, 246 U. S. 135; *Looney vs. Crane Co.* 245 U. S. 178; *Crew*

Levick Co. vs. Pennsylvania, 245 U. S. 292; *Wallace vs. Hines,* —— U. S. —— (Decided May 3, 1920, reported in L. Ed. Adv. Ops. 500).

As was said in *Kansas City, F. S. & M. R. Ry. Co. vs. Botkin,* 240 U. S. 225, in discussing whether a state exaction burdened the interstate commerce power of the national government:

> "In determining whether a tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce clause, our decision must regard the substance of the exaction—its operation and effect as enforced—and cannot depend upon the manner in which the taxing scheme has been characterized. * * * A tax may be in form a privilege tax and yet in substance, may be a direct tax on property." * * *

And again, in *Mugler vs. Kansas,* 123 U. S. 623:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."

Such is the established rule of constitutional construction. *Western Union Telegraph Co. vs. Kansas, supra;* and cases cited.

(b) It is wholly immaterial that a burden was not intended to be cast upon the state's power, if the Act operates as such its validity cannot be sustained.

That the Act in imposing this tax upon the "transfer of the net estate" imposes the tax upon the mass of the estate, rather than upon the interests produced as the result

of the states' regulation, is not open to serious argument. *In re Hamlin*, 226 N. Y. 407, 7 A. L. R. 701; *Plunkett vs. Old Colony Trust Co.*, 233 Mass. 471, 7 A. L. R. 696.

The same transfer sets in operation the states' power of regulation and the tax in question. The same property is the concern of each. By the very design of the Act in respect to the measurement of the tax and the manner in which laid, it seems intended and purposed to have operation and effect in utter disregard of the states' acknowledged power, by intercepting the exercise of that power, reaching over and withdrawing from operation and appropriating to its purposes the very object which the states' power especially concerns, but whether intended as such or not is wholly immaterial if the Act operates to cast a burden upon the states. In *Crutcher vs. Kentucky*, 141 U. S. 47, this court said:

> "These regulations (speaking of the Kentucky statute requiring licenses of foreign corporations) are clearly a burden and restriction upon that commerce. Whether intended as such or not, they operate as such."

Also in *Minnesota vs. Barber*, 136 U. S. 313, 319, 323, where a state statute was assailed as a burden on interstate commerce, this court said:

> "There may be no purpose on the part of the legislature to violate the provisions of that instrument and yet a statute enacted by it under the forms of law, may, by its necessary operation be destructive of rights granted or secured by the Constitution." * * *

That such is the operation and effect is borne out by the interpretation of the Commissioner of Internal Revenue

in the Regulations 37 promulgated pursuant to the provisions of the Act, reading as follows:

"ARTICLE 1. Neither a property nor a legacy tax. —The Federal estate tax is imposed upon the transfer of the net estate, determined in the manner prescribed, of every person dying after September 8, 1916. The tax is not laid upon the property but upon its transfer from the decedent to others. The subject of tax is the transfer of the entire net estate, not any particular legacy, devise or distributive share. It is not an individual inheritance tax. The value of the separate interests and the relationship of the beneficiary to the decedent have no bearing upon the question of liability or the extent thereof. The transfer of property is taxable, although it escheats to the State for lack of heirs.

"ARTICLE 2. Nature of transfer.—The statute embraces transfers by will or under the intestate laws, and also transfers made by the decedent in his lifetime, when made in contemplation of death or intended to take effect in possession or enjoyment at or after his death. The statute also enumerates certain special cases not strictly of either character just described. The practical test of the existence of a taxable transfer is whether the statute directs that the property in question be included in the gross estate."

"ARTICLE 46." (Which has reference to the deductions authorized by Sec. 203 of the Act) * * * "No estate, succession, legacy or inheritance tax is deductible."

(c) The Federal power to tax on the occasion of transmission of property on death, must be governed by the state's exclusive power of regulation of that subject, and its full execution.

As before stated, "the sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission." *McCulloch vs. Maryland, supra;* and "a regulation when adopted is designed for the entire

result, and the production of a uniform whole," *Gibbons vs. Ogden, supra.* Regulation of transmission and descent is designed, and is exerted to produce a certain result. It deals with all the property within the states' dominion, and effects its disposition upon the occasion of the owner's death, to and among those designated from considerations of policy, in accordance with a general and uniform plan defining and specifying the portions of each on the basis of value. The result sought by the state may only be produced by entire freedom of action, throughout the whole course of transmission from the instant of death, which is the very point where the power of regulation is brought into exercise, until the full rights of the persons who shall stand as successors are defined and produced. The "interest that ceased on death" is the primary thing with which the state power deals. The right or privilege of the owner of property to transmit it on his death, or the exercise of that right or privilege is the very first step in state regulation, or the inception of regulation.

An exercise of that authority thus becomes the prime factor in the transmission of property. And when that factor is found standing in position between the decedent and the successors saying what shall pass from the decedent and be taken by the successors, and prescribing the conditions upon which the same may be done, it must stand admitted to have been designed for the entire result, and to produce a uniform whole. What is that result, but the definition of specified rights to what has passed? It is then only, and not before that result is produced by force of the states' laws, that the states have introduced a subject, or a definite thing, which is given existence by their authority.

If these propositions be admitted, as indeed they must,

it follows as a necessary consequence that the Federal power to tax the transmission of property by death is and must be governed by the states' power and its full execution, and, therefore can extend only to what shall have been introduced by the states' permission.

What subject may be deemed to have been introduced by the State of New York in view of the language of a recent case, *Matter of Watson*, 226 N. Y. 384, 399, when the Court of Appeals say respecting its so-called "transfer tax" law:

> "The beneficiary has no claim to the property of an ancestor except as given by law, and, if the state has a right to impose a tax at all upon the passing of property, the transferee takes only what is left after the tax is paid."!

What subject is deemed to be introduced by the California laws of descent and taxation of inheritances, when it is said in *Stanford's Estate*, 126 Cal. 112:

> "It is only by virtue of the statute that an heir is entitled to receive any of his ancestor's estate; and the legislature can provide that the whole or any portion shall go to the heirs or other beneficiaries upon the death of the ancestor. This being so, and the legislature in this case having determined that 95 per cent of the decedent's estate may go to his heirs, and that 5 per cent be retained by the state, it is too clear for argument that this 5 per cent vested in the state at the same time that the other 95 per cent vested in the heirs."?

If any state should say, for instance, that a person shall take by will or descent from any decedent domiciled therein, but ninety per cent or fifty per cent of the amount of any legacy, bequest or distributive share from property

within such state, and that as a condition entitling him thereto the balance shall be taken by the state (and this in substance and effect is what is said by such state laws, barring only the rate of the tax), upon what may Congress impose and fasten a tax? May it tax the one hundred per cent passing from the decedent? May it tax the ten per cent or the fifty per cent that the state has exacted as the condition upon upon which the successors may take the balance? Or can Congress only tax what each successor has derived in consequence of the exercise of the states' power?

(d) The operation and effect of the tax is to render the states powerless to regulate transmission of property on death in the manner sought by their measures.

So the individuality of the states' power being established as a regulation of the transmission of property by death, the crux of the problem here is whether the operation and effect of the Estate Tax as enforced, results in casting a burden upon that power? What is the operation and effect of the tax?

This tax by reason of its progressive scale and the specific exemption of $50,000 interferes with and denies to the states the general, equal and uniform operation of their laws of descent and the laws respecting the transmission of property by will, in this: that the interests of persons taking as heirs, or legatees, or devisees, are thereby varied and changed in amount not generally nor uniformly, but in the same degree that the rate applicable to the estate from which derived is made to progress or vary by reason merely of the size of the estate. Thus, the interests of persons taking by descent or by will, derived from an estate

not subject to the tax are unaffected; those derived from an estate subject to the minimum tax, are diminished one per cent; and the interests of persons likewise derived from an estate subject to the ascending rates are diminished from two per cent to approximately nine and one-half per cent depending on the value of the estate. Thus it comes to pass that a thing of certain value is diminished two, three or up to nine and one-half times as much in one man's hands as a thing of equal value is in the hands of another. Or, one man is compelled to forego even nine and one-half times as much as another for the same or equal thing acquired admittedly perforce of the states' authority.

Again, by reason of the specific exemption allowed upon all estates and by reason of there being no provision for exempting or deducting transfers of property made by decedents for public or charitable purposes expressly favored and encouraged by state enactments, further interference with the regulations undertaken by the states to secure a general and uniform operation and effect of their laws, is produced.

These questions respecting interference with the powers and regulations of the states may not be readily dismissed, nor answered, by saying that if the burden of the Estate Tax is or may be placed upon the estate or upon the shoulders of the successors, therefore it is not upon the power of the state to regulate; or by saying that if the state be allowed to deduct the full amount of its inheritance taxes before computation of the Estate Tax, therefore the burden cannot be upon the states' power.

In *Knowlton v. Moore,* when it was determined that the phenomenon subjected to taxation was the "transmission or receipt of property by death" and that the tax was measured by the value of separate legacies and distributive

shares, thus conceding full operation to the states' power of regulation, the conclusion was irresistible that the tax was a "burden cast upon the recipient, and not upon the power of the state to regulate." Thus a separate and independent tax was imposed upon the very act or fact *which performance of regulation consummated,* and being measured by the same thing or the same unit, obviously the burden was cast upon the recipient. In short, the thing which was seized upon by the tax was the thing produced by the state regulation, and in consequence a burden upon the power was an impossibility.

It may be further emphasized that the determination in *Knowlton v. Moore* that the burden was cast upon the recipient and not upon the power to regulate, was the inevitable conclusion drawn from certain antecedent propositions when established, and was not an arbitrary assumption. Those antecedent propositions so established were these: that the power of Congress to tax extends to all usual objects; that the transmission and receipt of property by death is a usual object of taxation; that the power to regulate transmission of property on death resides in the states and not in Congress.

Hence, when those propositions were established, taxability of the transmission or receipt of property by death by Congress necessarily rested upon the thing which was produced through the medium of the states' power, or that which emerged in virtue of the exercise of that power, which was nothing else but the interests which had become vested and consummated in the successors, to-wit: legacies and distributive shares. Were any doubt that any other conclusion could be reached it must be set at rest by the dissenting opinion of Mr. Justice White in *Snyder v. Bettman*, 190 U. S. 249, 258, which illuminated his opinion,

in *Knowlton v. Moore.* He there said: referring to such conclusion, quoting the conclusion in question:

> "Certainly, a tax placed upon an inheritance diminishes, to the extent of the tax, the value of the right to inherit or receive, *but this is a burden cast upon the recipient*, and not upon the power of the state to regulate.
>
> "This conclusion is absolutely essential to the construction of the statute in *Knowlton v. Moore.*"

So, here if it be argued that the burden of this tax is upon the estate or upon the successors, and is not upon the power to regulate, that contention assumes the very point in dispute. That argument begs the question for decision, which is whether the operation and effect of this tax casts a burden upon the states' power to regulate. It is obvious that if the power of the states to regulate is impeded, retarded or abridged in its exercise, or may not be exerted to its full strength or measure respecting the subject matter that a burden is cast upon such power. Would not the argument in *Western Union Tel. Co. v. Kansas, supra,* that the burden was on the telegraph company because it must pay the tax; or a similar argument in *Galveston, H. & S. A. R. Co. v. Texas, supra,* that the burden was on the railway company because it must pay the tax; or in *Brown v. Maryland, supra,* that the burden was on the importer because he must pay the tax, and therefore was not in any of the cases a burden upon the interstate commerce power of Congress, be the baldest possible assumption of the very point in dispute, or a form of begging the very question to be determined, namely: whether the operation and effect of the particular measure burdened such power?

Here the very question is, whether the operation and effect of this tax burdens, impedes or abridges the power of the states to regulate the transmission of property by death or prevents full and effective operation of that power in view of the manner this tax is laid.

Now, in respect to this tax, measured by the volume of the estate and not by the thing which state regulation has produced, either one of two results must follow, viz.:

> 1. The withdrawal from operation of state regulation of an amount of the estate equal to the sum of the tax before that regulation may function; or
>
> 2. The augmentation of the burden which the state power in functioning casts upon the successors, or the imposition of a condition which the state must yield to in performing its function.

In other words, the states' power is robbed of its exercise to the extent of the tax, or else that power is burdened in its exercise to the same extent, which comes to the same thing.

The right to tax the estate to any extent, when passing from a decedent, must operate upon the power to regulate transmission of the estate *before the power is exercised,* and have a sensible influence and effect on the states' power to regulate. The case of *Weston v. Charleston*, 2 Pet. 449, concerned the taxation by the City of Charleston of stock or bonds of the United States held by its citizens, and in respect to the question how and when such taxation operated to burden the borrowing powers of the national government, Chief Justice Marshall said:

> "The right to tax the contract to any extent, when made, must operate upon the power to borrow before it

is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely."

Were the propositions and the conclusions drawn therefrom to be disputed, concrete illustrations must demonstrate their soundness.

Reference to the Act shows that in the computation of the tax, for example, an estate of $50,000 (by reason of the exemption of that amount) is subject to no tax; a "net estate" of $50,000 is subject to a tax of $500; and a net estate of $10,000,000 is subject to a tax of $841,000. In the case of A, the sole heir or devisee of the first estate mentioned of $50,000, the state regulation defining and measuring his right thereto is allowed full operation because of the exemption. In the case of B, entitled to take as sole heir at law or by will, the "net estate" of $50,000 above mentioned, diminution is suffered to the extent of $500. In the case of C, entitled to take as heir at law or by legacy or devise the sum of $50,000 from the $10,000,000 estate above mentioned, diminution is suffered to the extent of $4,205.

In the first case no burden rests upon the state's power. In each of the other cases a burden does rest upon that power which has been exerted to produce in B and C things of equal value. By reason of withdrawal from those estates of the amount of the respective taxes therefrom, that state power is impotent to consummate in B and C that which it accords them, or else in according to them those benefits another and independent authority has assumed to add or impose conditions upon the acquisition of

those benefits, or to augment in greatly varying degree the conditions the state has seen fit to impose thereon. Either the state is powerless to effect transmission in B and C of the same thing or a thing of the same value which it effects in A, through laws designed to produce a uniform result under like situation; or the state in effecting transmission in A, B and C of things of equal value (which for uniformity of result their like situation compels) suffers an inability so to do except by allowing another and independent authority to exact nothing from A, $500 from B and $4,205 from C, before that result is reached. Thus no separate and independent burden, as resulted in the Knowlton case, is cast upon that which performance of regulation consummates, but a burden is cast upon the performance of that regulation.

All states provide certain exemptions from their burdens for widows and children of decedents, and usually provisions made for public charities or municipal purposes are wholly exempted therefrom, from highest considerations of legislative or public policy. Let us suppose that the decedent leaving the "net estate" of $10,000,000 has provided one-fourth for a public charity or a municipal purpose, which is exempted from burden on the part of the state, nevertheless that provision by this tax suffers diminution in the sum of $210,250, or else others must shoulder that much greater burden.

It is undoubtedly true that the Federal Government *when taxing within its lawful power* is not bound to recognize exemptions of subjects created or allowed by the states. But that principle may not be extended so as to deny to the states the power, nor to embarrass the states in the exercise of power, to make such exemptions from the operation of their own measures as their legislative

policies may dictate. The following propositions are self-evident: whatever diminishes an estate produces an immediate and direct diminution of equal amount in some share or shares in that estate. Whatever diminishes an estate before regulation of descent or succession has operation diminishes in equal amount immediately and directly that upon which regulation may operate. So, when the estate stands diminished before regulation is allowed to operate, that regulation or the power to regulate must be ineffectual to accomplish to the extent diminution has been suffered, that which is sought by it. On the other hand, when regulation of descent or succession is allowed full operation upon an estate, it is of course fully able to effect its purpose in respect thereto. Whenever regulation of descent or succession effects its purpose, then what remains subject to diminution is nothing but the several shares which such regulation has produced. Hence, when the shares which have been produced as the result of regulation, are then diminished in consequence of the exertion of the power by another taxing authority, the burden falls not on regulation, nor the power to regulate because it has performed its function, but on the shares themselves or the recipients of those shares.

Now, when a state declares that legacies for charitable or municipal objects shall pass *in toto* exempt from *any* burden, or that provisions for widows and children shall be partly exempt, it undertakes to produce a result which it is admittedly qualified to do. In the attainment of that result it has not undertaken to say, that therefrom or thenceforth such objects shall be or stand exempt from the burdens cast by another taxing authority. So, if such an estate suffers diminution through interposition of another taxing authority, either before or during operation of the

state's measures, the state is powerless to effect the result undertaken, just to the extent diminution has been suffered. If that result sought be to pass a definite amount or thing free from any intermediate burden, then, it is obvious that the interposition of such a burden by another taxing authority between the grant of the thing and the consummation of the grant, arrests the function of the state's power in respect to the result sought. In other words, the interposition of such a burden denies to the state the rightful exercise of the power to grant the particular exemptions. On the other hand, were that power allowed to fully function an object or thing is thereby introduced, to which the Federal taxing authority may or may not grant exemption as it sees fit. If the Federal authority grants no exemption from its burdens, no burden rests on the state's power in consequence, but solely on such object or thing or the recipient of it.

Thus the difference between the operation and the effect of a tax which denies, impedes or abridges the full exercise of regulation and one which is predicated upon the fact which full exercise of that power consummates, is at once apparent. If the national government shall, through a measure of progressive taxation step in and withdraw varying amounts from subjects, or attach burdens thereto, *before the state may exert its power in respect to those subjects, or in disregard of what that power seeks to perform*, the operation and effect of such a measure is to deny to the state the authority possessed respecting a matter acknowledged to be its especial concern, and to assume regulation of those subjects admitted to be within the control of the state.

For the reason that the measures taken by the state to regulate transmission of property on death thus may not

have their lawful operation and effect, it becomes at once apparent that the mere allowance to the state of the right to deduct its revenue or so-called inheritance taxes before computation of the Estate Tax in nowise clears the matter. That revenue is exacted for the production of a certain result. That result is not produced by receipt of the consideration but by performance of the thing for which a consideration is exacted.

Respecting the operation and effect of the Estate Tax, a very similar question was presented by an Act of the General Assembly of Pennsylvania, whereby a tax was imposed upon all personal property passing by will or intestate law, (less deductions for debts, etc.); provided that personal property to the amount of $5,000 in all estates should be exempt. The Constitution of the state provided that "The General Assembly shall not pass any local or special law * * * changing the law of descent or succession."

The validity of the Act in view of the constitutional provision was attacked in *Estate of Cope*, 191 Pa. St. 1. (s. c. 45 L. R. A. 316) the Court there say:

> "The act in question has none of the features of an intestate law, or of any act regulating the disposition of property by will or by instruments in the nature thereof. On the contrary, upon its face and in all its provisions it is manifestly a tax law, clearly and distinctly predicated of the actual existence and general operation of an intestate law and a wills act, under the operation of one or other of which the personal property intended by its provisions to be subjected to taxation would pass from the then, as well as subsequent owners thereof to others, or had theretofore passed and become vested in others prior to the date of the act under consideration. * * *

"As our laws of descent and succession stood prior to the passage of the 'direct inheritance tax law', the personal property specified in said act was never subject to any 'burden, bonus, excise, or assessment' whatever. The pre-existing law of succession is changed by that act, in that it imposes a burden on so much of said property as is in excess of five thousand dollars, and leaves it unchanged as to the residue. It is, therefore, a special and not a general act, because it does thus impose a burden on a part of said property, and declares that, in all estates, personal property, not exceeding five thousand dollars in value, shall be exempt from said burden. It thus changes the law of succession as to part of the property specified therein, and attaches a condition to the right of succession which is neither general nor uniform, in that the burden is not imposed upon all distributees or all estates of decedents, but only upon a portion of them arbitrarily selected, while others in precisely the same class are exempted therefrom. * * * On the commonwealth's own assumption, therefore, the act is a special law changing the law of successions, and is clearly forbidden by article 3, section 7, of the Constitution."

The principle of that case has direct applicability here. There the general power to tax came squarely in conflict with that other power to regulate descent or succession subject to a certain limitation, and in consequence the measure taken was obliged to yield to the overriding authority of the power to regulate, for otherwise the measure taken *assumed to do the thing prohibited.* There the act, by reasons of the exemption of $5,000 and the tax of two per cent, changed the general law of descent and succession in allowing persons entitled to $5,000 or less to take what the general law gave them, and in not allowing persons entitled to amounts above that sum to take within two per cent of what that law gave them. Here, the Act, by reason of the

exemption of $50,000 allows persons entitled to an estate so exempted to take what the state laws give them; but changes the state laws of descent and succession in not allowing persons who are entitled to net estates above $50,000, by reason of the tax thereon ranging from one per cent to ten per cent, to take within one to approximately ten per cent, as the case may be, of what the states declare they shall have perforce of general and uniform laws determining descent according to relationship, and distribution under wills, applicable to all estates, large or small.*

*(Note). Since the preparation of this brief, the attention of counsel has been called to the discussion of the question by Dr. Carl C. Plehn of the University of California in his "**Introduction to Public Finance,**" 4th Ed., revised 1920 (Macmillan), wherein, at p. 215, the same conclusion is reached. He there says:

> "CONSTITUTIONALITY OF FEDERAL TAX.—There is doubt as to the constitutionality of this tax. Under the Constitution all law relating to property rights and in regard to the devolution of property is state law. Congress may not deprive the states of the power to establish the right of succession and of bequest nor can it limit or abridge those powers. The power to tax is the power to destroy. If by taxation Congress takes away part or all of the value of property left by a decedent it takes the kernel of the state's right and leaves the shell only. When the inheritance tax of 1898 was before the courts it was first decided that the tax was upon the distributive shares, and was a 'burden cast upon the recipient and not upon the power of the state to regulate.' The whole argument implies that a tax imposed on the net estate of the decedent and thus directly impinging on the determination of the devolution would be invalid as limiting the power of the state in its own proper field. There is a distinct difference between this estate tax and one on the transfer or right to receive property after the state, by exercise of its powers, has established the right. If, as may be contended, the estate of a deceased person passes first to the state and remains for a time in custody of the state, the federal tax is a direct attack on the state itself. If, on the other hand, the estate of the deceased, is, on the very instant of death, broken up into the several estates of the heirs and legatees, it breaks up only by virtue of and in accordance with the laws of the state, which are nullified or vitally amended by the interposition of the federal tax and the seiz-

Hamilton said in *"The Federalist,"* No. XXXI:

"The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. *Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the Federal legislature should attempt to vary the law of descent in any state; would it not be evident that, in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the state?* Suppose again, that upon the pretense of an interference with its revenues, it should undertake to abrogate a land tax imposed by the authority of a state, would it not be equally evident, that this was an invasion of that concurrent jurisdiction in respect to this species of tax, which its constitution plainly supposes to exist in the state governments?" (Italics ours.)

"To what purpose," it was said in *Marbury v. Madison*, 1 Cranch, 137, 176.

"are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation."

ure by the federal government of part of the estate precedent to the distribution. The argument in Knowlton v. Moore (178 U. S. 41), rests wholly on the fact that having decided first that the tax before the court fell on the distributive shares the court could then claim that the state had finished the exercise of its reserved powers and there was no barrier for Congress to step in and tax. But the matter is wholly different where the tax is on the estate, before distribution or while in the custody of the state. Probably the courts will be called upon to pass on this point."

How more certainly could a measure taken by Congress be leveled at the legitimate powers of the states actively and constantly drawn into exercise upon the death of citizens? The conclusion is irresistible that if the Estate Tax shall have operation and effect, Congress thereby assumes to do what the states are alone authorized, and undertakes regulation or participates in regulation of a subject within the states' exclusive power.

The right of Congress to tax within its delegated power is unrestrained, except as limited in mode by the Constitution, and "the judicial power may not usurp the functions of the legislative in order to control that branch of the government in the performance of its lawful duties," *McCray v. United States*, 195 U. S. 27, 61.

Tested by the principle that a lawful taxing power "acknowledges no limits but the will of the legislative body imposing the tax," which is to say, that the lawful power may be exerted to the point of destruction without being constitutionally invalid for that reason, it is at once apparent that if Congress should impose a tax upon the interests and benefits, which the states produce through their measures taken in regulation of transmission of property by death, to the extent of one hundred per cent of their value, no burden whatsoever in operation and effect would be cast upon the power of the states; the burden would be wholly on the objects or things so produced or the recipients of those things.

On the other hand, if Congress may tax in the mode of this tax, by an increase in rates to the extent of one hundred per cent of estates passing on death, it is too obvious to require discussion that the operation and effect of such tax must be to extinguish all power and voice on part of the states in the transmission of property by death. It is

equally obvious that any tax having the operation and effect of this tax, short of a one hundred per cent rate, burdens, impairs, impedes and embarrasses the states in the performance of transmission of property by death. For these reasons the burden cast is not incidental but immediate and direct.

Or if Congress should so amend the Act as to increase the present rates of taxation to one hundred per cent on all "net estates" in excess of one million dollars, (since the initial Act of 1916, the maximum rate has been increased to twenty-five per cent on all net estates of $10,000,000 and upwards), what power could be said to be manifested by such an increase or readjustment of rates? The power of taxation? Is it not palpable that the operation and effect of such an increase in the rate of taxation would be to limit the amount of property that may be disposed of on death? Is it not at once clear that it must deny to the states any voice whatsoever in respect to whom and how an estate in excess of one million dollars shall pass upon death?

How and when did Congress derive the right or the power to limit the accumulation of wealth, or, which amounts to the same thing, to limit the amount that persons dying shall transmit to descendants or successors? Or to interdict the right of descendants or successors to take or succeed in the case of an estate above a certain amount? How and when did Congress become possessed of the right or power to interdict the right and authority of the states to regulate the transmission of property regardless of amount, or to deny to the states the operation of their laws taken in respect thereto?

Clearly the exertion of such a power can find no justification in the right to tax accorded by the Constitution. The result cannot be avoided or concealed by calling the

exaction a *tax*. To hold that it is a tax is, as was said by Mr. Justice Harlan in *Western Union Tel. Co. v. Kansas, supra,* "to allow form to control substance."

It was precisely the situation which this tax presents, to-wit: the subversion by one authority through a mode of taxation of an exclusive power of another, which Mr. Chief Jusice Marshall inveighed against in *McCulloch v. Maryland, supra,* when he said "that the power to tax involves the power to destroy." As Mr. Justice White remarked in *Knowlton v. Moore*:

> "This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein."

Knowlton v. Moore dealt with a tax on legacies and distributive shares;—a tax which from its nature might follow naturally and properly the definition of those interests perforce of state regulation previously exercised, in full heed of the elementary rule "that when the constitutionality of a statute is assailed, if the statute is reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is the plain duty to adopt that construction which will save the statute from constitutional infirmity." Here we are confronted with the proposition that this tax shall precede those interests and the authority by which acquired. *Knowlton v. Moore* can therefore stand as no authority which justifies an operation and effect different from that there under consideration.

Any contention that this tax may have valid operation and effect simply amounts to the assertion that two things not equal to the same,—one a power of regulation, and the other a power to tax,—are nevertheless equal to one another, which when reduced to the lowest denomination demonstrates its unsoundness.

(e) No power exists in either state or nation which involves the functions of one by the other.

Concerning the relation of the states to the Union and the Union to the states, Chief Justice Chase said, in *Texas v. White*, 7 Wall. 700:

> "Under the Constitution, though the powers of the states were much restricted, still, all powers not delegated to the United States, nor prohibited to the states, are reserved to the states respectively, or to the people. And we have already had occasion to remark at this term, that 'the people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the states in union, there could be no such political body as the United States.' *Lane v. Oregon*, 7 Wall. 71. Not only therefore, can there be no loss of separate and independent autonomy to the states through their union under the Constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. *The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states.*" (*Italics ours.*)

From the analysis that has been made it is evident that the states are not indestructible in any proper sense

if Congress may constitutionally impose taxation, the necessary operation and effect of which is destructive of the power of the states to control their own internal affairs. By such means every faculty of the states, except the capacity to exist as political bodies merely, might be paralyzed or rendered useless so far as its exercise could benefit their citizens, or promote their welfare.

No power is given under our system to either state or nation, which involves the functions of one by the other. On no other principle can our dual government exist. It is essential to the preservation of our system of government that the line of demarkation between the delegated powers of Congress and the reserved powers of the states should be distinctly defined and scrupulously respected. This court has never hesitated, when a proper case was presented, to condemn the legislation of either one when it encroached upon the rights of the other. One of the most recent examples of this is the decision of this court in *Hammer v. Dagenhart,* 247 U. S. 251, holding the "child labor" legislation of Congress, Act of Sept. 1, 1916, prohibiting transportation of manufactured goods, the product of child labor, to be an invasion of the state's reserved powers. No greater service can be done the country by this great tribunal than the re-affirmation of this sound doctrine.

There is no purpose or thought to argue here that the United States may not tax the transmission or receipt of property by death as and when effected by state laws. The power so to do is fully acknowledged. The measures taken by the states do not tend to withdraw from the operation of the rightful power of Congress those subjects, but on the other hand, to produce definite subjects in a general and

uniform manner, which shall be open alike to the general taxing power of the states and the nation.

FOURTH

Though there may be a seeming exercise of the taxing power, the Act complained of is so arbitrary as to constrain to the conclusion that it is not the exertion of taxation, but a confiscation of property, or so wanting in basis for classification as to produce such a gross and patent inequality as to lead inevitably to the same conclusion.

The infirmity in a measure taken by one sovereignty which results in a burden upon or impairment of the power of another, necessarily affects the rights and interests of persons which depend upon that power. Thus a state enactment which in operation and effect burdens the power of Congress to regulate interstate commerce, subjects those coming within the purview of the particular enactment to unusual, and what are, as a necessary consequence, unlawful burdens. Indeed, it is the unlawfulness of the burden which demonstrates the impairment of the power concerned. *Galveston H. S. & A. R. Co. v. Texas, supra; Western Union Tel Co. v. Kansas, supra.* The one is the necessary consequence of the other.

Whether or not a particular measure taken by one sovereignty offends against the exclusive power of another, that measure may still possess independent infirmities,—as in the disregard of fundamental principles of taxation, or in disregard of limitations on the taxing power, or otherwise—which render it invalid. So, here this tax presents questions, whether viewed apart from or as a consequence of the one above considered respecting the burden upon or

impairment of the state's power, which concern the validity of the imposition.

(a) The subject of taxation is the "transfer," and necessarily involves the interests of the transferees.

Legitimate operation and effect of a taxation measure taken by Congress, in the nature of a death duty, requires that the tax depend upon a subject which shall have been introduced through the permission of the states, namely: a transfer or succession completed or consummated in the successors in the manner in which their rights have been measured and defined. This is but to say that the phenomenon which may be subjected to taxation is such only as the power put in exercise having regard to its limitations may legitimately have operation and effect upon.

By *subjects of taxation* is commonly understood, "the phenomena subjected to taxation," (Seligman, *Essays on Taxation*, p. 395); or as otherwise expressed, "the facts or things upon which taxes are imposed," (Bastable, *Public Finance*, p. 249).

The "pith and substance" of the Act is contained in Sec. 201, reading as follows:

> "* * * a tax * * * equal to the following percentages of the value of the net estate * * * is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act" * * *

What phenomenon is here subjected to taxation? The term "transfer" as used in transfer tax acts is held to be used in its ordinary sense, "which is, that the owner of a thing delivers it to another person with the intent of passing the rights which he has in it to the latter," *Matter of*

Gould, 156 N. Y. 423. It is synonymous with "passing" or "change of title" or "change of possession," *Dixon v. Russell*, 78 N. J. L. 296. There being no appreciable difference in phraseology between the state transfer tax acts, generally modeled upon the New York Act, and the Federal Estate Tax Act, in the clauses respectively imposing the tax, nothing gives warrant to the view that "transfer" is used in the Federal Act in any sense other than its usual acceptation.

A transfer not only implies but necessarily involves a transferer, a transferee or transferees, and a subject transferred. The implication of the relation of predecessor and successor and of the existence of a succession is patent. To bring a case within the Act persons standing in the relation of successors must actually acquire under the specified circumstances something of value, capable of appraisal and possessing the attributes of property, for it is manifestly impossible to impose a transfer tax unless a transfer has taken place. Beneficial interests must therefore have arisen in the transferees through a death in order to constitute a transfer that may be taxable, and the Act so shows.

Sec. 202 provides that the value of the gross estate shall be determined by including: (a) all property of a decedent "which * * * is subject to distribution as part of his estate"; (b) all property of which the decedent has at any time made a transfer, or created a trust "in contemplation of or intended to take effect in possession or enjoyment at or after his death," and that all such transfers made within two years of death "shall unless shown to the contrary be deemed to have been made in contemplation of death"; and (c) all property "held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part there-

of as may be shown to have originally belonged to such other person and never to have belonged to the decedent."

Further, Sec. 205, provides for a return by the executor of the value of gross estate, the deductions allowed, the value of the net estate and the tax payable thereon, requires the executor, if unable "to make a complete return as to any part of the gross estate of the decedent," to include in his return a description of such part and the name of every person holding *a legal or beneficial interest therein,* and upon notice from the collector such person shall in like manner make a return; and Sec. 208, provides that if the tax is paid by or collected from that part of the estate passing to or in the possession of any person other than the executor, such person shall be entitled to contribution "by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts or other charges against the estate."

Thus it is made plain by the various provisions, that the Act is predicated upon the existence of benefits which have arisen in persons standing in the relation of successors, since upon any other interpretation of the Act, no object can be presented upon which the language can operate.

The tax is not in terms imposed upon the net estate of every decedent dying after the passage of the Act, but is in terms imposed "upon the transfer of the net estate" of every such decedent. What is that "net estate"?

Sec. 201 provides the ascending scale of rates based, in the case of the lowest rate, on *"the amount of such net estate,"* and in the cases of the higher rates, on *"the amount by which such net estate"* exceeds one sum and does not exceed another.

Sec. 202 provides what shall be included in determining the value of "gross estate," as just mentioned.

Sec. 203 provides that the value of the net estate shall be determined, by deducting certain enumerated items and amounts from the value of gross estate.

The residue must be what is contemplated by the Act as "net estate," the transfer of which is taxed. Hence everything which shall be so valued as gross estate, and from or of which no deduction is made, must remain in the category and constitute "net estate." In other words, the construction of the Act requires that the terms "gross estate' and "net estate" where spoken of, shall consist of the very same things, which are valued for the purposes of the measurement of the tax. No other construction is possible or permissible, for the reason that there are no words in the Act which imply that any other result was intended.

It may be contended by the government that the tax is an *estate tax,* levied and imposed upon a subject different from that upon which state inheritance, succession or transfer taxes are imposed, and in consequence is a tax of different character. That contention rests on the assumption that the words "net estate" when coupled with "transfer" in the phrase, Sec. 201, *"upon the transfer of the net estate of every decedent,"* etc., of itself characterizes a different subject. Net estate is and can be nothing else than the aggregate of the benefits taken by the transferees after the execution of the trust imposed upon the executor (leaving out of view the sum expressly exempted by the Act from taxation, which by its presence or absence in any case only affects the amount of the tax). "The real interest passing is what remains after payment of debts and other charges." *Matter of Westurn,* 152 N. Y. 93. Net estate specifies a certain quantum, as distinguished from some other quantum, as,

for instance, "gross estate." It will not be disputed that "net estate" is the unit by which the tax is sought to be measured. But when that unit, which describes the quantity of the objects to be taken as the standard of measurement, is again employed in the same sentence, what element to the phenomenon of transfer has been added if any? That no element is added when its office is understood, is readily apparent from the following demonstration.

Let us suppose, that the Act were drawn to read:

> That a tax * * * equal to the following percentages of the value of the *net estate* * * * is hereby imposed upon the transfer of the *gross estate* of every decedent; * * *

or again:

> That a tax * * * equal to the following percentages of the value of the *net estate* * * * is hereby imposed upon the transfer of the *property* of every decedent; * * *

or still otherwise:

> That a tax * * * equal to the following percentages of the value of the *gross estate* * * * is hereby imposed upon the transfer of the *net estate* of every decedent. * * *

Is it not apparent that in all these cases the act or fact involved which alone gives rise to the tax is the same, namely: the transfer or transmission effected by death? Obviously, the tax in the first two cases is measured by a standard more restricted than the area over which the tax has operation. On the other hand, in the third case, the tax is measured by a standard less restricted than the area of the tax. The result must be only such a difference in

the amount of burden imposed upon the subject, or in the area over which the burden is spread, as there is difference between the measure and the area. Thus "gross estate" and "property" in the first and second cases and "net estate" in the third, merely mark the boundaries or dimensions of the field within which the tax imposed upon the occasion of the transfer of property by death operates; which is aptly described by the English judges and text writers as "the ambit of the duty." *Winans v. Atty. Gen.*, L. R. App. Cas. (1910) 27; or the "area of taxation," *Hanson's Death Duties*, 6th Ed. pp. 20 and 128, and *Soward L. & Pr. Estate Duty*, p. 4.

Now what is the subject of taxation in any or all the three supposed cases? Is it not at once apparent that when the same act or fact of transfer is involved, whether expressed in relation to "gross estate" or "net estate" or simply "property," that neither has changed the subject of taxation, nor substituted a different subject? The result is merely the expression of a different quantum of the same subject; or to give a more or less restricted ambit to the tax imposed.

Mr. Justice White said in the *Knowlton case*, p. 57:

> "Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit, or the transmission or receipt of property by death which is the subject levied upon by all death duties."

Hence if the subject of all death duties be such, the mere specification of a quantum does not make a different subject.

That there may be no misunderstanding as to what is meant by the above quotation from *Knowlton v. Moore*, it

is proper to observe that what Mr. Justice White thus said respecting the subjects of all death duties preceded his discussion of the question of the respective powers of the states and of the national government to impose death duties, and had no reference to any restrictions or limitations that may rest upon the powers of either. The power to transmit exists as an attribute of property either perforce of ownership of property or is derived from the states in virtue of their regulation, and a tax upon it must be exposed to the charge of being a direct tax upon property, or of being a burden on the power of the states. *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U. S. 522, 530; *Dibrell vs. Lanier*, 89 Tenn. 497, 12 L. R. A. 70.

That the subject of the tax in the Knowlton case was not the "power to transmit," is made clear by Mr. Justice White's discussion of the respective powers of the states and national government with respect to death duties in that case, and is made still clearer by his own explanation of the Knowlton case, in his dissenting opinion in *Snyder v. Bettman*, 190 U. S. 249, 258, where he said:

> "It was not only directly held in *Knowlton vs. Moore* that the tax was on the transmission or the receipt of the legacy occasioned by death, and was therefore not on the property, not on the estate, not on the executor, but that it was also held to be a burden imposed on the recipient."

The question is wholly unimportant here for neither by construction of the Act, nor by any legitimate operation as above shown, may the Estate Tax be considered as imposed upon the power to transmit.

"The character of a tax, or its validity, is not determined by the mode adopted in fixing the amount." *Maine*

v. Grand Trunk R. R. Co., 142 U. S. 217. That principle is one of frequent application, *St. Louis v. United Rys.*, 263 Mo. 387, 444; *Kane v. Titus*, 81 N. J. L. 594, and was lately employed in *Flint v. Stone Tracy Co.*, 220 U. S. 107, as the facts show.

It follows, that the measurement of the tax by the value of the net estate, and the definition of the area of the tax, do not determine either the character or the subject of the tax.

Resort to the sub-title of the Revenue Act of 1916, to-wit: "Estate Tax" throws no light toward a construction that the tax imposed is upon the interest that ceased on death, as distinguished from a tax upon the interest which someone takes on a death, in the face of the express language that the tax is "imposed upon the transfer" which is the identical thing that the states have undertaken to consummate in successors perforce of their regulations.

For the reasons advanced, the term "transfer" comprehensively embraces the several interests or benefits of all successors, and the imposition of the tax upon the transfer certainly involves and affects those interests or benefits. And it follows, perforce, that the imposition of the tax "upon the transfer" results in taxation of the successors in respect of their several interests or benefits in the transfer, or in taxation of those interests or benefits *en masse*.

(b) The measurement of the tax by the mass of the net estate produces profound inequality between persons circumstanced alike, or standing in the same relation.

An heir at law takes by descent "an undivided interest in the whole estate," *Matter of Ramsdill*, 190 N. Y. 492, 496.

A legatee or devisee takes a specific interest in the estate. The Act makes no express reference to the persons to whom property passes nor to the amount of benefit taken by them. The tax is levied indifferently whether they are relatives of decedent or strangers in blood. The tax is not made to depend upon the way in which the property passing is split and distributed in virtue of the states' power.

Hence, in the case of intestate estates the share of each successor will stand diminished not in accordance with the value of his interest, but in the proportion that the value of his interest bears to the value of the whole estate passing. The amount of the burden to be borne bears no relation to the value of the interest, the acquisition of which alone makes taxation possible, but to something wholly apart, accidentally existing. In the case of testate estates the same result must follow, unless even greater inequality is produced by placing the entire burden upon the residuary estate "in ease of the rest," which is the necessary effect of recent decisions in some states. *Plunkett v. Old Colony Trust Co.,* 233 Mass. 471, 124 N. E. 265, s. c. 7 A. L. R 696; *In re Hamlin,* 226 N. Y. 407; 124 N. E. 4, 7 A. L. R. 701, and note.

Thus, this tax, if to have operation, presents a similar situation which the Act of 1898 would have produced, had not the reference therein to "legacies and distributive shares" enabled differentiation of that tax from one measured by the mass of the estate, and a construction to which the present Act is not for the same reasons susceptible. An apparent purpose of Congress in this enactment, was, it seems from the framework of the Act, to raise the question suggested and severely condemned in *Knowlton v. Moore*, not necessary to decision for the reasons mentioned.

By concrete illustration the workings of the tax may

be shown. The table contained in the appendix gives the amount of the tax on each block of an estate up to $10,000,000.00.

Thus, if A is entitled to a distributive share, whether by will or descent, of $50,000, from an estate subject to the minimum rate, that share will stand diminished one per cent, or $500.

If B is entitled to a distributive share, whether by will or descent of equal amount, $50,000, from an estate of $10,000,000, that share will stand diminished eight and 41-100 per cent, or $4205.

The distributive shares are precisely equal in amount and in value. The interest of either A or B in the respective estates is determined by the value of his share, and not by the value of the estate. Nevertheless diminution is suffered by one from so arbitrary, capricious and accidental a thing as if determined by count of the number of beans in a bag. The share of one is diminished approximately eight and one-half times as much as the other's, for a benefit of equal value. In other words, the same or equal thing is considered worth one dollar to one man and eight and one-half dollars to another.

Mr. Justice White in *Knowlton v. Moore*, pp. 74, 76, speaking in reference to the contention that the tax was laid on or measured by the mass of the estate said:

> "Must it not be considered that the statute provided for no such discordant and unjust discrimination? * * *
>
> "In other words, the construction (contended for against the tax) proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is

that the house of A, which is only worth $1,000, may be taxed, but the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus, a person dying and leaving an estate of $10,500, bequeaths to a hospital $10,000. The rate of tax would be 5 per cent, and the amount of tax $500. Another person dies at the same time, leaves an estate of $1,000,000 and bequeaths $10,000 to the same institution. The rate of tax would be 12½ per cent, and the amount of the tax $1250. It would thus come to pass that the same person occupying the same relation, and taking in the same character two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other. In the arguments of counsel tables are found which show how inevitable and profound are the inequalities which the construction must produce. Clear as is the demonstration which they make, they only serve to multiply instances afforded by the one example which we have just given."

The New York Legislature in 1910 proposed to amend the law of that state so as to measure the tax by the volume of the estate. In his veto of that measure, Governor Charles E. Hughes, (*Public Papers of Gov. Hughes*, 1910, pp. 104, 105, 184) spoke as follows:

"The objection lies to the method of graduation. The progressive rate appears to depend not upon the amount of property or interest received by the individual transferee, but upon the size of the whole estate passing to those who are not exempted from the provisions of the law. * * *

"The bill provides that the tax imposed with respect to collateral relatives and strangers shall be seven per cent if the value of the property does not

exceed $100,000; eight per cent if it exceeds $100,000 and does not exceed $250,000, and ten per cent if it exceeds $250,000. In the case of those within section 221 of the Tax Law, including, father, mother, husband, wife, child, brother and sister, the tax of one per cent is imposed if the property is of the value of $10,000 or more and does not exceed $100,000, two per cent if it exceeds $100,000 and does not exceed $250,000; and five per cent if it exceeds $250,000.

"Hence, under this bill it would seem that persons who stand in the same relation to two decedents and receive legacies of precisely the same amount will pay inheritance taxes at different rates according to the size of the estate left by the decedents respectively.

"This method of graduation has been condemned as opposed to sound policy." * * *

The claim that such a tax may be measured by the "net estate," or the mass of the property passing presents for consideration the fundamental question having two aspects: (1) whether a tax so imposed is laid "with reference to the ability of the person upon whom the burden is placed to bear the same"? and (2) whether in the mode adopted there is not entirely wanting a proper basis for classification?

(c) The tax is not laid with reference to the ability of the person upon whom the burden falls to bear the same, because there is no sense of proportion between the burden and the value of the benefit.

In *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 203, this court, speaking in reference to sound legislative aim: The requirement that every citizen shall

contribute in proportion to his property, and the avoidance of unequal burdens, used the following language:

> "As said by Adam Smith in his *Wealth of Nations*, Book V. Chap. 2, pt. 2, p. 371: 'The subjects of every state ought to contribute towards the support of the government as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state. The expense of government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the estate. In the observation or neglect of this maxim consists what is called the equality or inequality of taxation.'"

Amplifying those principles, Mill, *Political Economy*, Book V, ch. II sec. 2, said:

> "For what reason ought equality to be the rule in matters of taxation? For the reason that it ought to be so in all affairs of government. * * * If any one bears less than his fair share of the burden, some other person must suffer more than his share, and the alleviation to the one is not, *caeteris paribus*, so great a good to him, as the increased pressure upon the other is an evil. Equality of taxation, therefore, as a maxim of politics means equality of sacrifice."

Rates of taxation progressing in accordance with the benefit derived have long been features of inheritance or succession and income tax laws. "Taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government" was said by Mr. Justice White in *Knowlton v. Moore*. Ability to pay or "equality

of sacrifice" in respect to governmental burdens, is nothing but the application of the principle that each individual should be held to help the state in proportion to his ability to help himself. Seligman, *Essays on Taxation,* 21, An invidual's ability to help himself can be measured or translated only in terms of value. In *Monticello Distilling Co. v. Mayor,* 90 Md. 416, cited in *Cooley on Taxation,* 3rd Ed., 12, the court says:

> "The value of the things owned fixes the measure of the owner's ability to contribute in taxes towards the support of the government. This is an axiom of political economy no less than a fundamental provision of our organic law."

The theory upon which progressive rates are based, is, the greater the individual benefit derived the greater is the ability to pay. Or, as says Seligman again, p. 82, "So far as a man receives special opportunities from the community, which undoubtedly increase his ability to pay, they should be taken into account in framing any scheme of taxation." To justify progression in taxes some sense of proportion between the burden and the value of the benefit is necessarily involved. Manifestly to measure the burden not by the value of the benefit derived, but by a wholly distinct and separate thing is to say that "ability to pay" arises from something else than the qquantum of benefit. To so adjust the burden results in nothing but disproportion in sacrifice. *State ex rel, Garth vs. Switzler,* 143 Mo. 287, 40 L. R. A. 280; *state ex rel. Swartz v. Ferris,* 53 Ohio St. 314, 30 L. R. A. 218.

From the practical workings of this tax it clearly appears that it is not measured by the individual benefit which is actually involved and necessarily implied by the

imposition of the tax "upon the transfer" as has been hereinbefore shown, but by something which by pure accident of circumstances penalizes individuals in respect to their benefits with a varying severity.

(d) The Act is entirely wanting in proper basis for classification and sensibly violates fundamental principles underlying just taxation in the utter disregard of the interests of persons patently present in the subject taxed.

The rule of uniformity lying at the basis of every just system of taxation, requires the same means and methods to be applied impartially to all constituents of each class, so that the burden bears equally and uniformly upon all persons in similar circumstances. *People ex rel. Hatch v. Reardon* 184 N. Y. 431, aff. 204 U. S. 152; *Magoun v. Illinois Trust & Savings Bank, supra; Hayes v. Missouri,* 120 U. S. 68; *Barbier v. Connolly,* 113 U. S. 27; *Cooley on Taxation,* 3rd Ed. 260. The test of propriety of classification is whether there be "some difference which bears a reasonable and proper relation to the attempted classification and is not a mere arbitrary selection." *Gulf, Col. &S. F. Ry. Co. v. Ellis,* 165 U. S. 150; *Magoun v. Illinois Trust & Savings Bank, supra; Black v. State,* 113 Wis. 205.

A proper basis for an attempted classification, as is said in *Gulf Col. & S. F. Ry. Co. v. Ellis, supra*:

> "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." * * *

The Act does not classify by arranging according to the value of the separate rights and interests of persons, which such "transfer" to them necessarily effects, but by arranging according to accident. While it places the amount of all "net estates" exceeding one sum and not exceeding another, in a class, still the burden does not bear equally and uniformly upon all persons in like relation or similar circumstances. Without method or order the burden bears heavily upon some and lightly upon others circumstanced alike.

Each class consists simply of a specified amount of estate, and the only difference or distinction is in volume. Who are the constituents of each class but the persons in whom the "transfer of the net estate" effects individual rights and interests having relation one with another in equality, degree, amount or character? Is there equality within the classes when the members of each class are not treated alike, that is to say: when all who inherit $10,000 are not treated alike—all who inherit any other sum are not treated alike? What difference is there between a legacy or distributive share of $10,000 from an estate within the exemption and a like legacy or distributive share derived from a "net estate" of $500,000, or of $1,000,000 or of $10,000,000? What difference is there bearing "reasonable and proper relation to the classification" when nothing short of the fact that the legatee or distributee has become entitled to that sum, enables the tax to have operation? It comes but to this, that one man's burden is greater or less depending upon circumstances beyond his control, and that burden may be, by reason of the progression in rates, vastly disproportionate to the burden borne by another in respect to a thing of the same or equal value.

It was on this ground that similar classifications made

for inheritance taxation by the states, involved in the cases: *State ex rel. Garth v. Switzler,* 143 Mo. 287, 40 L. R. A. 280; *State ex rel. Swartz v. Ferris,* 53 Ohio St. 314, 30 L. R. A. 218; *State ex rel. Sanderson v. Mann,* 76 Wis. 469, and *State v. Gorman,* 40 Minn. 232, were condemned.

Where separate rights and interests in individuals alone give rise to a tax is it any less arbitrary to erect a classification for the purpose on the basis of the value of the net estate from which derived, than to base it on the census count of the community in which the decedent was domiciled? It was held in *Clark v. Titusville,* 184 U. S. 329, that a license tax imposed upon persons carrying on certain occupations, regulated by the amount of the sales was not improper classification for it did not fail to treat "all alike under like circumstances and conditions, both in the privilege conferred and the liability imposed." But what could be said of such a tax if imposed upon all persons carrying on the particular occupation in a five-story building, regulated by the amount of aggregate sales? Or if all those in a ten-story building severally doing an equal or less business should nevertheless be subjected to a higher rate?

The power to make classification of objects of taxation springs from the power to tax. Hence Congress, which may only tax the transmission of property on death when the states' power thereover shall have been expended, must base its classification upon that which has been produced by the expenditure of the states' power. In other words when Congress is enabled to tax a definite thing, its classification must have relation to that thing, else an unjust and unequal burden must result. As is shown by cases heretofore cited, to-wit: *Western Union Telegraph Co. v. Kansas* 216 U. S. 1; *Gloucester Ferry Co. v. Pennsylvania,* 114 U.

S. 196; *Philadelphia & S. Mail Co. v. Pennsylvania*, 122 U. S. 326; *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298; *Galveston H. & S. A. R. Co. v. Texas*, 210 U. S. 217; and *Fargo v Hart*, 193 U. S. 490, subjects of taxation were presented lawfully within the power of the states, but the classification of corporations engaged in interstate commerce in accordance with the amount of entire capital stock, amount of gross earnings derived from all sources or the amount of dividends paid from all earnings, resulting in a burden on the interstate commerce power also, as a necessary consequence, resulted in unlawful burdens on the subjects taxed, because the standards of measurement bore no proper relation to those subjects.

The classification which the law contemplates, *is classification of the subjects or objects of taxation*, or the phenomena subjected to taxation, not a classification of standards or modes of measurement having no just relation to the subjects or objects of taxation. *Home Ins. Co. v. New York*, 134 U. S. 594; *Magoun v. Illinois Trust & Savings Bank, supra; Cooley on Taxation* 76; *Billings v. Illinois*, 188 U. S. 97. Were it not so the effect must be to tax, either the thing seized upon to measure the tax or the definite thing which only may be taxed, arbitrarily and unequally as between persons in the same circumstances.

A variety of illustrations of the invalidity of the classifications here involved is presented by the following cases. *People v. Raynes*, 120 N. Y. Supp. 1053, Aff. 198 N. Y. 539, respecting a license fee charged on persons selling convict-made goods where the classification was held invalid because based upon "the origin of the goods dealt in, without regard to the quality or character or nature of the goods themselves." Also see *People ex rel. Farrington v. Mensching*, 187 N. Y. 8; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375;

Danville v. Shelton, 76 Va. 325; *Bangor's Appeal,* 109 Pa. St. 79; *Re Ruan St.,* 132 Pa. St. 257; *Commonwealth v. Patton,* 88 Pa. St. 258.

Perfectly equal taxation will remain an unattainable good as long as laws and government and man are imperfect. *Grim v. School District* 57 Pa. St. 433, but, as said Mr. Justice Field in *Stanley v. Supervisors,* 121 U. S. 535, 550:

> "The most that can be expected from wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity * * * is complied with, *when designed and manifest departures from the rule are avoided.*" (Italics ours.)

And said Mr. Justice Brewer, speaking of the Fourteenth Amendment, in *Cotting v. Kansas City Stock Yards Co.,* 183 U. S. 79, 110:

> "That constitutional provision does not, it is true, invalidate legislation on the mere ground of inequality in actual result. Tax laws, for instance, in their nature are and must be general in scope, and it may often happen that in their practical application they touch one person unequally from another. *But that inequality is something which it is impossible to foresee and guard against,* and therefore such resultant inequality, in the operation of a law does not defeat its validity." (Italics ours.)

In a classification for governmental purposes there cannot be an exact inclusion of persons and things, *Magoun v. Illinois Trust & Savings Bank, supra.* But, because an exact inclusion of persons and things may be unattainable, it affords no justification for an arbitrary and purposeful exclusion of persons and things in making a classification.

Where those persons and things are patently present in the subject seized upon, and, indeed, without which there would be no subject, their exclusion can only be ascribed to a direct and intentional purpose to make the tax unequal in its operation, or to an utter disregard as to its effect. That a tax upon property passing to persons in accordance with state statutes, when not proportioned to the amount severally passing to them, will not cause an inequality and discrimination, which is direct, immediate and must be foreseen, belies intelligence.

Undoubtedly the authority possessing the right to limit the amount of property that its citizens may dispose of on death, may make such classifications as are necessary to that end. It may have regard for the "interest which ceased on death" and none for "the interest to which some one succeeds on the death," and in consequence may measure the tax by the volume of property passing from decedents, erect such classifications in respect to amount, and provide such progressive rates as it may determine. Such in principle is the English Estate Duty. We have refrained hitherto from drawing any comparison between that duty and the Estate Tax, for were it to be shown that there is a similarity in the general scheme of both, no analogy could be drawn in consequence, either in principle, operation, effect or otherwise, because the powers from which the enactments proceed, differing in nature, extent or limitation, permit no analogy to be drawn between them. If the English Parliament, untrammelled by limitations upon its power, shall be moved by considerations of public policy to impose a tax, as it has, directly upon property passing from decedents on the occasion of death, Congress, possessing the power to tax, within certain limitations and with restrictions upon exercise requiring regard to be shown for the

independent and exclusive power of another sovereignty, may not impose a tax of like nature, operation and effect. There is a vast difference between a power which enables taxation of property *as property freely and directly,* and makes that tax accrue on death (and such unquestionably is the nature of the English Estate Duty; *Winans v. Atty. Gen.,* L. R. App. Cas. (1910) 27; *Cowley v. Commissioners of Inland Revenue,* L. R. App. Cas. (1899) 198; *Atty. Gen. v. Beech,* L. R. App. Cas. (1899) 53, 56; *Hanson's Death Duties,* 6th Ed. 1, 2); and a power though vast and searching in extent, which from its limitations, may only resort to the *passage of property,* or the "transmission or receipt of property" as and when introduced and permitted by another distinct sovereignty. There must be an equal difference in the measures proceeding from the respective powers, when legitimately taken.

(e) The Fifth Amendment stands as a condition upon which the power to tax may be exercised, and because of the inequality and capricious operation produced, the Act must stand condemned as in violation of that amendment.

Equally and in the same respects, the "due process of law" clause in the Fifth Amendment restrains the action of Congress, as that clause in the Fourteenth Amendment restrains the action of the states. In *Hurtado vs. California,* 110 U. S. 516, 534, Mr. Justice Mathews, in construing the clause as used in the Constitution, referring to the Fifth Amendment, said:

> "The conclusion is * * * irresistible, that when the same phrase was employed in the Fourteenth

Amendment to restrain the action of the States, it was used in the same sense and with no greater extent."

The same meaning thereto is ascribed *in re Kemmler*, 136 U. S. 436. And in *Duncan vs. Missouri*, 152 U. S. 377, 382, Chief Justice Fuller in considering when due process of law is secured, said:

> "Due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

which was quoted approvingly in a review of a number of cases in *Connolly vs. Union Sewer Pipe Co.*, 184 U. S. 540, 559, 560.

Speaking further in *Knowlton v. Moore*, respecting the contention that the tax there concerned was measured by the mass of the estate, Mr. Justice White said, p. 77:

> "It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems. On this question, however, in any of its aspects, we do not even intimate an opinion, as no occasion for doing so exists since, as we understand the law, we are clearly of opinion that it does not sustain the construction which was placed on it by the court below."

What is a tax? That question was answered by the court speaking through Mr. Justice Field in *Pollock v.*

Farmers' Loan & Trust Company, 157 U. S. 429, 599, as follows:

> "The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax."

Cooley in his work on *Constitutional Limitations*, after treating upon the extent of the taxing power, points out the essential elements in all just taxation, which if disregarded will not leave the citizen without redress, "even though there be no conflict with express constitutional inhibitions," and thus sums up the matter, at p. 598 (6th ed.), as follows:

> "Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government."

The extent to which taxation may be exercised is in its very nature unlimited, unless restricted in some particular case or respect by constitution or statute. Where there is a lawful power to impose a tax its imposition may not be treated as without the power because of the destructive effects of the exertion of the authority. *McCray v. United States, supra.* The remedy for abuse in the exercise of a lawful power lies "not in the abuse by the judicial authority of its functions, but in the people." *McCray v. United*

States, supra; Gibbons v. Ogden, supra; Champion v. Ames, 188 U. S. 321; and *Spencer v. Merchant,* 125 U. S. 345.

While the *exercise* of the lawful power of Congress to tax is unlimited and may not be restricted by the courts, nevertheless limitations, or what are essentially such, rest upon the power itself, its use or which prevent abuse, aside from the modes or manner in which it may be exerted. The power to tax is said to extend to all objects, excepting exports, nevertheless the instrumentalities of the states employed to carry into operation their powers are not such objects to which the power to tax extends, *Ambrosini v. United States,* 187 U. S. 1; *United States v. Baltimore & Ohio R. R. Co.,* 84 U. S. 322, nor the officers of the state, *Collector v. Day,* 11 Wall. 113. Neither is the power to tax permitted to interfere with regulations of subjects taken or made by the states respecting matters under their exclusive control. *Knowlton v. Moore, supra; Hammer v. Dagenhart,* 247 U. S. 251; *Pervear v. Massachusetts,* 5 Wall. 475; *License Tax Cases,* 5 Wall. 462. For the reasons which have been advanced, and upon the authorities which have been cited in support, that power to tax does not extend to any subject in so far as to allow the imposition directly of arbitrary and unequal burdens upon persons.

Either these stand as restrictions or limitations on the power to tax, "arising from those fundamental conceptions of free government" underlying our constitutional systems, state and national, or there is an entire absence of power to tax objects in certain cases, and it seems immaterial to consider which. Are there no "express constitutional restrictions" from arbitrary deprivation of life or liberty or arbitrary spoliation of property on the part of Congress?

The Fifth Amendment may not be a limitation upon the taxing power of congress conferred by the Constitution, but

in the language of Mr. Justice Field in *United States v. Jones*, 109 U. S. 513, it must stand as "a condition upon which the power may be exercised."

Chief Justice White in *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 24, said:

> "The Constitution does not conflict with itself by conferring upon the one hand, a taxing power, and taking the same power away by the other." * * *
> But, said he, continuing:
> * * * "this doctrine would have no application in a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the Fifth Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

In concluding the court's opinion in *Knowlton v. Moore, supra*, Mr. Justice White said:

> "If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so."

The operation and effect of the Act is so arbitrary, as has been shown, as to constrain to the conclusion that it is

not the exertion of taxation, but a confiscation of property; and is so wanting in basis for classification, producing such gross and patent inequality, as to lead inevitably to the conclusion that it is an arbitrary spoliation of property.

CONCLUSION

For the reasons which have been advanced it is respectfully urged that the Estate Tax provided in the Revenue Law of 1916 is invalid in a constitutional sense on the grounds: (1), that its operation and effect is to cast a burden upon and usurp the plenary power of the states to regulate the transmission of property on death; and (2), that it transcends those principles which lie as the basis of constitutional and free government, and is an exertion of power inhibited by the Fifth Amendment.

ARCADIUS L. AGATIN and
FRANCIS H. De GROAT,
Attorneys for Clara B. Congdon, et al., Executors
Amici curiae.

APPENDIX

Table for Computing Estate Tax.

Net Estate.			Sept. 9, 1916, to March 2, 1917, Inclusive (Revenue Act of 1916).		
Exceeding	Not Exceeding	Amount of Block	Rate Per Cent	Tax	Total
$..................	$ 50,000	$ 50,000	1	$ 500	$ 500
50,000	150,000	100,000	2	2,000	2,500
150,000	250,000	100,000	3	3,000	5,500
250,000	450,000	200,000	4	8,000	13,500
450,000	750,000	300,000	5	15,000	28,500
750,000	1,000,000	250,000	5	12,500	41,000
1,000,000	1,500,000	500,000	6	30,000	71,000
1,500,000	2,000,000	500,000	6	30,000	101,000
2,000,000	3,000,000	1,000,000	7	70,000	171,000
3,000,000	4,000,000	1,000,000	8	80,000	251,000
4,000,000	5,000,000	1,000,000	9	90,000	341,000
5,000,000	6,000,000	1,000,000	10	100,000	441,000
6,000,000	7,000,000	1,000,000	10	100,000	541,000
7,000,000	8,000,000	1,000,000	10	100,000	641,000
8,000,000	9,000,000	1,000,000	10	100,000	741,000
9,000,000	10,000,000	1,000,000	10	100,000	841,000
10,000,000	....	....	10	....	....

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

NEW YORK TRUST COMPANY AND ALBERT W. Pross, as executors of the last will and testament of J. Harsen Purdy, deceased, plaintiffs in error, *v.* MARK EISNER.	No. 286.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

In all of the briefs filed in this case, stress is laid on the line of cases holding that a tax so levied by a State as to be a burden upon interstate commerce is, to that extent, a regulation of interstate commerce and an encroachment upon the exclusive power of Congress over that subject. From this, it is argued that a tax upon the devolution of property occasioned by death is a regulation of descent and distribution which, it is said, belongs exclusively to the States.

A moment's consideration, however, will show the fallacy of this contention. The principle upon which the cases referred to rest, in fact, fully sustains the

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right of the Federal Government to impose death duties.

It may be assumed that, before the formation of the Federal Government, the States possessed plenary power over the subjects both of taxation and of interstate commerce as well as the descent and distribution of property. It is now settled that the grant of power to Congress to regulate interstate and foreign commerce was exclusive. This grant was, therefore, a limitation upon the State's power of taxation to the extent that such taxation could be regarded as a regulation of interstate commerce. It is not doubted that imposing a tax so as to burden interstate commerce amounts to a regulation. Hence, it was inevitable that such a tax should be held invalid.

If we assume that a death duty of any kind amounts to a regulation of the descent and distribution of property, and apply the rule or principle applied in the cases above referred to, the obvious conclusion is that the Federal Government possesses the power of regulation to that extent. The power to impose taxes is granted to Congress in the most sweeping language, and, as shown in the original brief, applies to all the usual subjects of taxation, which includes the transmission of property from the dead to the living. This power, as has been repeatedly held, is subject only to such limitations as are imposed by the Constitution of the United States itself. If the levying of death duties amounts to a regulation of

the descent and distribution of property, the power to regulate, to that extent, has been expressly conferred upon Congress. Of course, the primary power of the States to regulate was not taken away. But just as the grant of the power to regulate commerce operated as a limitation upon the power of the States to tax, so the grant of the power to tax operates as a limitation, to that extent, upon the power of the States to regulate descent and distribution. The only difference lies in the fact that the power of the Federal Government to tax is not an exclusive power.

The grant of power to tax, for the purposes of the Federal Government, did not limit or impair the power of the State government to tax for its purposes. Each Government is free to tax the same subject matter for its own purposes. The limitation of the State's taxing power in the case of interstate commerce comes from its exclusion, by the Constitution, from the right to regulate, in any form, such commerce. In the case of the devolution of property no such limitation is placed upon the power of Congress. The result is that, so far as the imposition of death duties may be said to amount to a regulation of the devolution of property, the power to regulate has been expressly granted to Congress. The State may regulate, as it sees fit, the right to transmit or to receive property. And the imposition by the Federal Government of a tax which reduces the amount to be either transmitted or received does not impose

any burden or restriction upon *the right of the State.* At most, it merely imposes an additional regulation upon the right of the individual to either transmit or receive. And the right to impose this additional regulation is necessarily included in the power to tax.

There is nothing new or startling in this view of the law. It is the view upon which taxation by the Federal Government, from the beginning, has been based. Indeed, it has constantly been held not only that a tax is not invalid because imposed upon something which is within the primary power of a State to regulate, but that the power to tax necessarily implies the power to make such regulations as may be appropriate for the collection of the tax. Thus, practically the whole system of internal revenue laws has been applied to subjects which are primarily within the control of the States. Before the adoption of the eighteenth amendment Congress had no independent power to regulate the manufacture of or traffic in intoxicating liquors. This was a subject which belonged to the police powers of the State. A State had the power to determine whether liquor should be either manufactured or sold within its bounds. This was a subject within its control in the same sense that the devolution of property is within its control. Yet, for many years, a large part of the revenues of the Federal Government were derived from taxes on the manufacture and sale of intoxicating liquors.

The States, in the exercise both of their police and taxing powers, licensed the manufacture and sale of liquors. In this way, they imposed regulations upon the business. When Congress saw fit to impose the same kind of taxes, it merely added another regulation which the power to tax gave it the right to impose. The same is true of the tax on the manufacture and sale of tobacco, oleomargarine, narcotics, and practically every internal revenue tax which has been imposed by Congress. It is for this reason that Federal taxes on conveyances, bank checks, admissions to theaters, the sale of soft drinks at soda fountains, and the numerous other excise taxes have always been sustained. Moreover, it is not only the right to regulate which results from the mere imposition of the tax that exists in Congress. Having imposed the tax, it has the implied power to prescribe such regulations as it deems necessary to secure collection. A striking illustration is found in the numerous regulations which have always been applied to the manufacture and sale of intoxicating liquors. A still more striking illustration is found in the drastic restrictions thrown around the sale at retail of narcotics, which has been sustained by the court as within the implied powers of Congress. Indeed, if, in the exercise of its taxing power, Congress had not the power to regulate, to the extent necessary to collect its taxes, subjects within the primary control of the States, the power of Congress to impose excise taxes would be limited

in the extreme. Not much would be left except the right to levy such taxes upon interstate and foreign commerce.

It is suggested in a brief filed on behalf of one of the States that this tax withdraws from the State a large amount of property which it has the right to tax. This suggestion arises from the fact that the Federal tax is measured by the amount of the estate to be transmitted and is taken out before distribution, with the result that the amount subject to State succession taxes is decreased to that extent. The fallacy in this argument is that the act of Congress does not restrict, in any degree, the power of the State to impose death duties as it sees fit. It may measure these death duties as to it seems proper. It may so frame its tax laws that the death duties which it exacts shall be measured not by what is finally received, but by what is to be transmitted before the deduction of the Federal tax. In other words, the Federal Government and a State government may each, in the exercise of its independent taxing power, impose a tax upon exactly the same subject matter. Each may levy a tax on the same income without allowing deductions for the amount paid by the other. Each may impose death duties in the same way.

Respectfully submitted.

William L. Frierson,
Solicitor General

April, 1921.

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